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In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, PETITIONER

v.

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

J. LEE RANKIN,
Solicitor General,
PERRY W MORTON,
Assistant Attorney General,
ROGER P. MARQUIS,
Attorney,
Department of Justice, Washington 25, D.C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered July 16, 1958.

OPINION BELOW

The opinion of the Indian Claims Commission of March 12, 1957 (App. 95–115)[1] is reported at 5 Ind. Cls. Com. 96. Its opinion of July 18, 1957 (App. 116–136) is reported at 5 Ind. Cls. Com. 297. The opinion of the Court of Claims of July 16, 1958 (Appendix, *infra*, pp. 25–35) is reported at 163 F. Supp. 603. Its opinion of October 8, 1958 (Appendix, *infra*, pp. 36–43) is reported at 166 F. Supp. 939.

[1] References to "App" are to the appendix to the Government's brief in the Court of Claims.

JURISDICTION

The judgment of the Court of Claims was entered on July 16, 1958 (Appendix, *infra*, p. 35). A timely petition for reconsideration was denied on October 8, 1958 (Appendix, *infra*, p. 43). By order filed January 3, 1959, the time for filing a petition for writ of certiorari was extended to and including January 26, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255 and Section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. 70s.

QUESTIONS PRESENTED

1. Whether payments made by the United States in satisfaction of judgments rendered against Indian Tribes because of depredations committed by members of the Tribes against non-members are proper offsets against a judgment rendered for the Tribes under the Indian Claims Commission Act.

2. Whether payments gratuitously made to needy or indigent members of the Tribes may be so offset.

STATUTES INVOLVED

Section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1050, 25 U.S.C. 70a, provides in relevant part:

* * * * * *

> In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136;

28 U.S.C. sec. 250), as amended; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

The Indian Depredations Act of March 3, 1891, 26 Stat. 851, provides, in part, as follows:

> That in addition to the jurisdiction which now is, or may hereafter be, conferred upon the

Court of Claims, said Court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely:

First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.

* * * * *

SEC. 6. That the amount of any judgment so rendered against any tribe of Indians shall be charged against the tribe by which, or by members of which, the court shall find that the depredation was committed, and shall be deducted and paid in the following manner: First, from annuities due said tribe from the United States; second, if no annuities are due or available, then from any other funds due said tribe from the United States, arising from the sale of their lands or otherwise; third, if no such funds are due or available, then from any appropriation for the benefit of said tribe, other than appropriations for their current and necessary support, subsistence and education; and, fourth, if no such annuity, fund, or appropriation is due or available, then the amount of the judgment shall be paid from the Treasury of the United States: *Provided*, That any amount so paid from the Treasury of the United States shall remain a charge against such tribe, and shall be deducted from any annuity, fund or appropriation hereinbefore des-

ignated which may hereafter become due from the United States to such tribe.

The Deficiency Appropriation Act of July 28, 1892, 27 Stat. 282, 319, provides, in part:

> For payment of judgments * * * after the deductions required to be made under the provisions of section six of the act approved March third, eighteen hundred and ninety-one [26 Stat. 853] * * * shall have been ascertained and duly certified by the Secretary of the Interior to the Secretary of the Treasury, which certification shall be made as soon as practicable after the passage of this act, and such deductions shall be made according to the discretion of the Secretary of the Interior, having due regard to the educational and other necessary requirements of the tribe or tribes affected, and the amounts paid shall be reimbursed to the United States at such times, and in such proportions, as the Secretary of the Interior may decide to be for the interests of the Indian service.

STATEMENT

This petition is addressed solely to the disallowance of certain offsets against a judgment awarded to the Kiowa, Comanche and Apache Indian Tribes under the Indian Claims Commission Act. In very brief summary, the facts are that prior to 1889 the Kiowa, Comanche and Apache Tribes owned lands in Oklahoma. The so-called Jerome Agreement was negotiated with them which was eventually ratified by the Act of June 6, 1900, 31 Stat. 672, 676. This agreement provided generally for cession of the Tribes' Oklahoma lands to the United States, for allotment of the

lands in severalty, and for the payment of $2,000,000 for surplus lands. The Tribes, claiming that the value of the lands far exceeded the amount paid to them under the Jerome Agreement, sought recovery under the Indian Claims Commission Act as if the Agreement were revised for fraud, duress, unconscionable consideration, mutual and unilateral mistake, and to accord with fair and honorable dealings. The Indian Claims Commission awarded, and the Court of Claims affirmed, a judgment for $2,067,166 based on the conclusion that the land acquired by the United States was worth $4,067,166 in 1900, while the Indians were paid only $2,000,000 (App. 54, 71). The Commission held that the Jerome Agreement did not bind the Indians because of the changes made before Congress ratified it, and that it was unnecessary to determine whether the Agreement was obtained by fraud, duress, mistake, or was based upon unconscionable consideration (App. 38). The Court of Claims held that the recovery was justified either as damages for breach of contract implied in fact, or as a measure of recovery on the ground of fair and honorable dealings (Appendix, *infra*, p. 32).

Under Section 2 of the Indian Claims Commission Act (*supra*, pp. 2–3), certain offsets are to be deducted from awards made under that Act, and the United States asserted that such offsets should be allowed here. The largest of the two offsets which are the subject of this petition is $1,561,368 for "depredation" judgments. These represent payments made by the United States between 1901 and 1919 in satisfaction of 1103 judgments entered against the Tribes under the Act of March 3, 1891, *supra*, pp. 3–5, to compensate

citizens for property taken or destroyed by the Indians. The 1891 Act provided for payment of these judgments from certain monies held for, or owing to, the Tribes; and in the event that payment could not be made from such funds, the Act provided for payment by the United States. Later appropriation acts, with one exception, provided for a certificate by the Secretary of the Interior as to the possibility of payment from the funds specified by the 1891 Act; and such a certificate was given as to each of the 1,103 judgments involved here, to the effect that (Fdg. 27(d), App. 76–77):

> * * * I hereby certify that none of the tribes or nations of Indians against whom the above specified judgments were rendered have any annuities due them from the United States or any other funds due them from the United States arising from the sale of their lands or otherwise, nor is there any appropriations for their benefit other than the appropriation for their current and necessary support, subsistence and education available for the payment of the judgments rendered against them, or out of which the same should be paid, due regard being had to their educational and other necessary requirements.

Article XI of the Jerome Agreement, 31 Stat. 672, 680, also provided: "That none of the money or interest thereon which is, by the terms of the said agreement, to be paid to said Indians shall be applied to the payment of any judgment that has been or may hereafter be rendered under the provisions of the Act of Congress" of March 3, 1891, *supra*.

The Indian Claims Commission refused to offset these "depredation" judgments, which had been paid by the United States, on the ground that the various appropriation acts gave the Secretary of the Interior discretion whether the judgments should be paid from the particular sources mentioned; that the Secretary had acted in making the certifications referred to above; and that the Commission could not review the Secretary's exercise of that discretion (App. 96–103). The Commission rejected the Government's alternative contention that the judgments should be considered as "payments made by the United States on the claim" within the meaning of Section 2 of the Claims Commission Act, *supra*, p. 2, saying, "Nothing in the act or the circumstances of its passage lend support to this contention."

In affirming, the Court of Claims, in the one paragraph of its original opinion dealing with offsets, made no specific mention of the "depredation" judgments (Appendix, *infra*, pp. 33–34). The subject was discussed, however, in the opinion of October 8, 1958, denying rehearing (Appendix, *infra*, pp. 36–42). The court there adopted the theory of the Commission that Congress had vested discretion in the Secretary of the Interior which he had exercised in filing the certificates. Alternatively, the Court invoked Article XI of the Jerome Agreement, saying that this was a case of revision of the Agreement on the ground of "unconscionable" consideration and hence that the judgment is to be regarded as money paid to the Indians under the agreement (Appendix, *infra*, pp. 41–42).

The other item of offsets here concerned was $396,844.96, paid between 1945 and 1956 to needy and indigent members of the Tribes. The Commission, in its first opinion, allowed this offset, holding (App. 106–107) that these payments to individual members "undoubtedly" * * * resulted in a tribal benefit". Upon rehearing, the Commission reversed itself, its opinion noting the importance of the question in this case as well as in other cases referred to in briefs *amici curiae*. Relying on *Osage* v. *United States*, 66 C. Cls. 65, 82, and *Fort Berthold Indians* v. *United States*, 71 C. Cls. 308, 340–341, rejecting as offsets expenditures for education of individuals at non-Indian reservation schools, the Commission ruled that only gratuitous expenditures for the Tribes "can be offset against an award in any case" (App. 125). Payments to needy Indians were, the Commission ruled, not made on a tribal basis and were therefore "not for the benefit of the claimant" (App. 126).

In its first opinion, the Court of Claims likewise made no specific reference to this offset, stating in general terms that the Commission had held that in some instances the United States had failed to sustain the burden of proof to show that expenditures actually were made for the benefit of the tribe and that, in other instances, the Commission held the amounts were expended for the benefit of individual Indians rather than for the benefit of the tribe and were therefore not allowable as offsets (Appendix, *infra*, p. 34). On rehearing, the court considered specifically the item of payments to individual Indians and said that the Commission had held that payments to individual Indians were not proper offsets against a

judgment in favor of the Tribe. The court recognized that its decision in *Quapaw Tribe of Indians* v. *United States*, 128 C. Cls. 45, allowing the offset of board and funeral expenses of indigent Indians was to the contrary. It expressly overruled this portion of the *Quapaw* decision, stating that another holding of *Quapaw*, disallowing presents to individual Indians as offsets, was inconsistent with the board and funeral expenses holding, and that the Commission was right in following the holding as to presents to Indians (Appendix, *infra*, p. 42).

REASONS FOR GRANTING THE WRIT

An integral part of the Indian Claims Commission Act is the allowance of offsets, to awards under the Act, for prior payments made by the United States to or on behalf of the plaintiff Tribe. Section 2, *supra*, pp. 2–3. In this case, the Court of Claims and the Commission have erroneously excluded major types of offsets claimed by the Government in Commission cases, and unless reversed the holdings below will therefore constitute the rule for all cases under the Act (and comparable statutes). Many millions of dollars are potentially involved. Review by this Court is necessary to correct an error so significant in the adjudication of the important claims under the Indian Claims Commission Act.

1. The offsets that have been allowed against claims asserted by Indian Tribes have regularly been considered an important element in determining the ultimate judgment that should be entered against the United States. See, *e.g.*, *Seminole Nation* v. *United States*,

316 U.S. 286, 308–309; *Menominee Tribe of Indians v. United States*, 118 C. Cls. 290, appeal dismissed by stipulation (after settlement), 342 U.S. 801. Historically, such offsets have been a significant factor, and the amounts involved have been very substantial. See Hearings before the House Committee on Indian Affairs, 79th Cong., 1st Sess., on H.R. 1198 and H.R. 1341 (bills to create an Indian Claims Commission), at pp. 167–170. Section 2 of the Claims Commission Act placed some limitations upon the offsets allowable, but at the same time at recognized the principle that the United States is entitled to proper offsets. For that reason, we believe it important to preserve to the United States its rights in this area.

Following the pattern of previous special jurisdictional acts for particular Indian claims, Section 2 has provided for two general types of offsets. The first are legal offsets—payments on the claim itself; and offsets, counterclaims, and demands that would be allowable in non-Indian Tucker Act cases.[2] As to this category, the duty of the Claims Commission is mandatory, since Congress said that it "*shall* make appropriate deductions" (emphasis added). The second broad category, to be discussed *infra*, p. 18, is money or property given to or funds expended gratuitously for the benefit of the Tribe, as to which the Commission is given authority to determine whether the entire course of dealings with the Tribe warrants the offset. In our view, the allowance of "depredation" offsets falls clearly into the first category of legal offsets, and the allowance of

[2] These offsets were formerly covered by 28 U.S.C. 250, and are now provided for by 28 U.S.C. 1503.

payments gratuitously made to needy or indigent members of the Tribes falls into the second category.

2. A continuing aspect of federal Indian policy since earliest days has been the recognition, in order to promote peaceful relations, of responsibility of the Indian Tribes for depredations committed by their members upon non-members and their property. Thus, in 1796, a statute provided for tribal responsibility, including withholding of annuities to the Tribe when a member should cross into a state or territory and commit specified offenses. See *Federal Indian Law* (Dept. of Interior 1958), p. 98.[3] Similar provisions were made from time to time, and treaty provisions implemented the same policy.[4] This tribal obligation was recognized in three different treaties with the Tribes here concerned. In Article 4 of the Treaty of July 27, 1853, 10 Stat. 1013, they agreed "to make restitution or satisfaction for any injuries done by any band or any individuals of their respective tribes * * *". In the Treaty of October 18, 1865, 14 Stat. 717, with the Comanche and Kiowa Tribes, provisions for peace and for arbitration of "depredation" claims on either side constituted Article I of the Agreement. A similar provision was given the prominence of Article I in the Treaty of October 21, 1867, with the Kiowa and Comanche Tribes, 15 Stat. 581.[4]

In the Indian Depredations Act of 1891, *supra*, pp. 3–5, Congress established a comprehensive system

[3] See Act of March 3, 1799, 1 Stat. 743, 747; Section 17 of the Act of June 30, 1834, 4 Stat. 729; Section 8 of the Act of February 28, 1859, 11 Stat. 388.

[4] It was this treaty which set aside the land for which the Tribes have been awarded the 1900 value in this case.

of adjudication of "depredation" claims in the Court of Claims, the judgments to be paid primarily from Indian funds but the United States guaranteeing payment to the injured party if the Tribe had no funds available. In this connection, Congress excluded from the Indian funds available "appropriations for their current and necessary support, subsistence and education". However, Congress made clear that any federal payment "shall remain a charge against such tribe". Section 6 of the 1891 Act, *supra*, p. 4. To make these provisions effective, Congress, in appropriating funds every year to pay these judgments, provided that the deductions "shall be made according to the discretion of the Secretary of the Interior, having due regard to the educational and other necessary requirements of the tribe or tribes affected, and the amounts paid shall be reimbursed to the United States at such times, and in such proportions, as the Secretary of the Interior may decide to be for the interests of the Indian service." *Supra*, pp. 5, 7. The certificate of the Secretary given each year was that no funds of the Tribes were available, in almost the exact language of the 1891 Act, with the addition of the phrase "due regard being had to their educational and other necessary requirements" (see *supra*, p. 7). In *Corralitos Company* v. *United States*, 178 U.S. 280, this Court reviewed at length the history of "depredation" claims, and said that the obligation of the United States under the 1891 Act was that of "a substantial guarantor" (p. 287).

Recoupment of the amounts paid by the United States as a guarantor upon judgments against the

Tribes—payments which were necessitated by the lack of tribal funds beyond those needed for current subsistence, support, and education—clearly falls within the first category under Section 2 of the Claims Commission Act, *i. e.*, a legal offset allowable in reduction of the claim of any obligor whose debt a guarantor has been obliged to pay. This is especially clear when Congress had explicitly directed that such "depredation" payments "shall remain a charge against such tribe." Section 6 of the 1891 Act, *supra*, p. 4. The Court of Claims so held in *Duwamish Tribe of Indians et al.* v. *United States*, 79 C. Cls. 530, certiorari denied, 295 U. S. 755, where "depredation" judgments paid between 1893 and 1901 were offset, saying (p. 613) that "The set-off is a legal one and not a gratuity."

Nevertheless, the Court of Claims here accepts the theory of the Commission that the offset was not allowable because the Acts under which funds to pay the judgments were appropriated (*supra*, pp. 6–7) gave the Secretary of the Interior a discretion whether the judgments should then be charged against the tribe, "having due regard to the educational and other necessary requirements of the tribe"; and he exercised that discretion when he certified that the tribes had no funds available, due regard being had to these requirements. The Court of Claims took the view that under these facts "the issue of reimbursement is closed" (Appendix, *infra*, p. 41). But obviously neither Congress nor the Secretary, in the period between 1901 and 1949 (when these certifications were made), could have had in mind the availability of the $2,067,166 now awarded to the Tribes.

Each appropriation Act and each certificate was addressed to the particular situation prevailing in that year. The Commission and the Court of Claims have given these actions an effect which neither Congress nor the Secretary could have contemplated at the time. Thus, the Commission and the court treat the legislation as if Congress had vested the Secretary of the Interior with discretion to determine whether reimbursement should or should not be had from the Tribes. That is not what the Acts provided, or what the Secretary certified. His authorization and his determination was that there were *then* no tribal funds available to pay the "depredation" judgments—thereby making use of appropriated funds permissible. In other words, he was determining the source of payment of the judgments, not the question of reimbursement if the appropriated funds were used for that purpose.

Moreover, the Commission's and the court's view, that the appropriation Acts represented a change of policy and a delegation to the Secretary of the Interior of authority to release the Government's claim to reimbursement for amounts it had paid as guarantor, frustrates the clearly expressed will of Congress in the 1891 Act that the payments "shall remain a charge against such tribe". Repeal of this express permanent legislation is not to be inferred by implication from the annual appropriation Acts. On their faces, each appropriation Act was directed simply to the appropriation then made. And it is highly significant that the decision whether tribal funds were lack-

ing, making use of appropriated funds necessary, was delegated to the Secretary in the very first appropriation Act to pay judgments under the 1891 Act. Act of July 28, 1892, *supra*, p. 5. The conclusion below requires the assumption that, on the first occasion to give effect to the 1891 Act, Congress receded from the policy there expressed, waived substantial rights of the Government, and conferred a windfall on the particular tribes benefited, contrary to the long-settled policy to make the Indian Tribes responsible for the depredations committed by their members. The inclusion of this provision, in every appropriation Act from 1892 on, demonstrates the understanding of both Congress and the Secretary that the permanent 1891 Act had not been amended so as to waive the Government's claim to recoupment from the Tribes. Legislative history indicating even a suggestion of waiver of that right is totally lacking and cannot, therefore, justify construing the statutes beyond their plain meaning.

When correctly read, the appropriation Acts are in perfect accord with the 1891 Act. Section 6 of that statute recognized that funds needed for "current and necessary support, subsistence and education" should not be taken from tribal funds to pay "depredation" judgments since that would merely require the United States to make other appropriation for their support. Quite naturally, the function of determining whether all funds were so needed was delegated to the Secretary of the Interior. Congress made clear the limited scope of its delegation when it directed that the Secretary should have "due regard to the educational

and other necessary requirements of the tribe or tribes affected." And the Secretary's certificate shows that he understood his function to be so limited. Nothing indicates delegation of an authority to use federal funds to pay the judgments if the Tribe had ample funds of its own to pay, without endangering its current needs.

The attempted invocation of Article XI of the Jerome Agreement (*supra*, p. 7) likewise attributes to Congress an intent it could not have possessed. That Congress was willing to exempt the $2,000,000 payable under that Agreement from "depredation" claims by no means indicates that it would exempt twice that amount. Rather than relinquishing the government's claim, the Agreement merely provided that money paid "by the terms of the said agreement" should be exempt. In claiming that the Agreement has been revised because of unconscionable consideration, the Court of Claims, for the purpose of denying the offset, is asserting a basis for decision contrary to that it asserted in its first opinion when it passed on the merits of the claim (*supra*, p. 6).[5] Moreover, the court does not explain why the amount of those judgments ($1,561,368) should not be a proper factor in determining whether the consideration could be called "unconscionable". Nor do we believe that this result can be justified by invocation of the "fair and honor-

[5] The Commission had specifically avoided a decision that the consideration was unconscionable. Such a conclusion, of course, requires far more than simply a holding that the amount paid does not equal what the Commission might find to be the 1900 value of the land ceded. The bargain must be extreme. *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 285.

able" dealings provision of the Indian Claims Commission Act. Fairness certainly requires that the United States be given credit, either as an offset or as a part payment on the claim, for the large amount it paid discharging the Tribes' obligations to third persons if the Jerome Agreement is now to be given the effect attributed to it by the Court of Claims.

Offset of the "depredation" judgments is, we believe, required by still another consideration. The Court of Claims in the *Duwamish* case, 79 C. Cls. 530, *supra*, had ruled in 1934 that such judgments were legal offsets.[6] In passing the Indian Claims Commission Act in 1946, Congress had in mind the offsets that had been allowed in Indian cases in the past. It declared its policy that a list of items which had previously been allowed by the courts as gratitous expenditures should not be offset under this Act. But it did not limit legal offsets, which it said the Commission "shall make". In our view, it thereby adopted the legal offsets the Court of Claims had allowed in the past, including payments of "depredation" judgments.

3. The second broad group of offsets under Section 2 of the Indian Claims Commission Act (*supra*, pp. 2–3), are "all money or property given to or funds expended gratuitously for the benefit of the claimant * * *," subject to the exceptions listed. In *Quapaw Tribe of Indians, et al.* v. *United States*, 128 C. Cls. 45, the Court of Claims held (p. 72) that "Indigent In-

[6] No factual distinction can be made of the *Duwamish* case which specifically referred to the 1892 appropriation Act giving the Secretary of the Interior discretion, and which involved payments made between 1893 and 1901 when all the appropriation Acts read the same.

dians, Board and Funeral Expense" was a proper offset under the Act. In *Menominee Tribe of Indians* v. *United States*, 118 C. Cls. 290, an offset was allowed under the Act for "Indigent Indians, Funeral Expenses" (p. 316). In *Quinaielt Tribe of Indians* v. *United States*, 118 C. Cls. 220, 227, decided the same day as the *Menominee* case, an offset was allowed of "Indigent Indians: Subsistence" under a special jurisdictional act providing for the determination by the court of all defenses, "including gratuities which the United States may have against any of said tribe or bands" (p. 231).

These decisions followed the regular practice which had been to allow the offset of items such as "Board of Indians," or "Care of Indigent Indians," under such acts as one authorizing suit by the Chippewa Indians of Minnesota and providing for the offset of "gratuities, if any, paid to or expended for said Indians". Act of May 14, 1926, 44 Stat. 555; *Chippewa Indians of Minnesota* v. *United States*, 91 C. Cls. 97, 122–123. The same result was reached as to several items of "Medical attention" under the Act of August 12, 1935, 49 Stat. 571, 596, which provided that as to all pending suits by Indian tribes or bands the court must offset "all sums expended gratuitously by the United States for the benefit of the said tribe or band". *Seminole Nation* v. *United States*, 93 C. Cls. 500, 513–514; see also *Seminole Nation* v. *United States*, 102 C. Cls. 565, 593–595, 632. In *Choctaw Nation* v. *United States*, 91 C. Cls. 320, 350–353, items for "Medical attention" and "Burial of Indians" were offset under the 1935 Act. See also *Shoshone Indians*

v. *United States*, 85 C. Cls. 331, 357 ("Medical attention"); *Chippewa Indians of Minnesota* v. *United States*, 88 C. Cls. 1, including on an accounting "Medical attention", "Burial of Indians", and "Care of Indigent Indians", as items found to have been made for the benefit of the Chippewa Indians of Minnesota (pp. 23–24).

Recognizing that expenditures for cash payments to indigent Indians "undoubtedly has resulted in a tribal benefit," the Commission first allowed them as offsets in this case (App. 105–107). As we have shown, this represented the previous understanding which was based on the thought that an Indian tribe, just like any other organized group in society, benefits as a whole when its poor are taken care of and given a decent burial. The Commission thereafter changed its position. After referring briefly to legislative history of the Indian Claims Commission Act (App. 118–120), the Commission relied upon Court of Claims decisions disallowing as gratuities expenditures made for education of Indians in non-reservation schools, stated that (App. 124) "a gift by defendant [the United States] to a member of a tribal claimant is not contemplated by the act as being for the benefit of the claimant," and concluded that only gratuitous expenditures to the tribe itself can be offset against an award in any case. In affirming, the Court of Claims expressly overruled the *Quapaw* case, *supra*, as to indigent benefits, saying that this holding was inconsistent with the exclusion from offsets in *Quapaw* of presents or gifts to individual Indians. But the fact that the tribal benefit from presents to individual members or from

education off the reservation are slight does not contradict the heretofore settled view that aid to the needy, while alive and after death, does definitely benefit the tribe as a whole. Neither the Commission nor the Court of Claims mentioned the *Menominee*, *Quinaielt*, or the other cases cited *supra*, although those decisions dealing with aid to the needy are more relevant then the off-reservation education cases or the "presents" cases on which reliance was placed.

Here again, the failure of Congress to reject the established rule when it passed the Indian Claims Commission Act should, we believe, be controlling. Rather than saying that only payments to the Tribe could be offset, Congress spoke of "all money or property given to *or* funds expended gratuitously for the benefit of the claimant." Since direct gifts to the Tribe are covered by the first phrase, the Commission's interpretation of the second phrase (*i. e.*, that only payments to the Tribe itself benefit it) eliminates the alternative provision. We think it clear that Congress used the word "benefit" in the same broad sense of direct or indirect benefit as it did in the 1935 Act and special jurisdictional acts discussed *supra*, pp. 19–20. Fortifying this view is the fact that the specific exclusions from the offsets allowable under Section 2 (*supra*, p. 3) covered such matters as appropriations or allotments made after March 4, 1933, "and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or

to increase employment, and for work relief (including the Civil Works Program) [which] shall not be a proper offset against any award." These excluded expenditures were in large bulk, if not completely, directed to individuals and were not channeled through the Indian Tribes. These exclusions of particular payments show that Congress contemplated that other payments to individual members, which did benefit the Tribe, would continue to be deductible.[2]

The denial of offsets here cannot be justified by reference to the discretion which is vested in the Commission to determine whether the entire course of dealings with the Tribe in question in good conscience warrants such action (*supra*, p. 3). The Commission expressly disclaimed exercise of such discretion, saying that the first question is whether the payments were for the benefit of the tribe within the meaning of Section 2 of the Claims Commission Act (App. 118). What we have here is a general construction of the Act, not an exercise of discretion on

[2] The Commission has reasoned that "the Government deals and keeps accounts only with Indian tribes", and therefore that the only allowable offsets could involve payments to the Tribes (App. 124). But the Court of Claims has held that alleged bands or tribes which the United States has never recognized as an entity by making payments to them (or the like) are nevertheless proper claimants under the Act. *United States* v. *McGhee*, 122 C. Cls. 380, certiorari denied, 344 U.S. 856; *Clyde F. Thompson* v. *United States*, 122 C. Cls. 348, certiorari denied, 344 U.S. 856; *United States* v. *Risling*, 122 C. Cls. 419, certiorari denied, 344 U.S. 856. The Commission's narrow view of offsets in this case might even automatically bar *all* offsets where the Government had never dealt or "kept accounts" with those alleged groups as such.

the facts of this particular case. The Court of Claims made no reference to the discretionary provision in affirming the Commission (Appendix, *infra* p. 42). And the Court of Claims has indicated in *Menominee Tribe of Indians* v. *United States*, 118 C. Cls. 290, 327, that allowable offsets should be deducted, in the absence of a finding that the course of dealings with the tribe would make such action unconscionable.

4. As we have already noted, resolution of the issues here presented is important to the conduct of all Indian Claims Commission cases. We are informed that some $5,000,000 in "depredation" judgments have been paid, and that many millions of dollars of offsets have been asserted based on payments to indigent Indians. While, of course, there can be no conflict of decision within the rules of this Court, the changes of position by the Court of Claims and the Indian Claims Commission on the merits of the issues raised in this case present, we submit, a situation calling for review by this Court. And we note that insofar as legal offsets (as distinguished from gratuities) are concerned, cases which may be brought in the future under Section 24 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1055, vesting permanent jurisdiction of claims accruing after August 13, 1946, will be affected.

CONCLUSION

For the foregoing reasons, it is submitted that this petition for a writ of certiorari should be granted.

Respectfully,

J. LEE RANKIN,
Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
Attorney.

JANUARY 1959.

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

Appeal 3–57

(Decided July 16, 1958)

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS

v.

THE UNITED STATES

ON APPEALS FROM THE INDIAN CLAIMS COMMISSION

LITTLETON, *Judge*, delivered the opinion of the court:

This is an appeal by the United States from a final determination of the Indian Claims Commission in Docket No. 32, dated March 12, 1957, as amended, on July 18, 1957, in which the Commission, after making findings of fact and rendering an opinion, held that the United States was liable to the petitioners for the difference between the value of certain land the price paid to petitioners therefor. The Government takes the position that the Commission erred as a matter of law in finding that the United States was liable to the petitioners under the circumstances of this case; that the Commission's findings of fact on the issue of value are either inadequate or not supported by substantial evidence on the record as a whole, and that the Commission erred as a matter

of fact and law in disallowing all offsets claimed by the United States.

The Kiowa, Comanche and Apache Tribes of Indians, petitioners below, have filed a notice of cross appeal urging that the Commission erred in finding too low a value per acre for the land acquired by the United States in 1900, and that the Commission erred as a matter of law when it did not allow interest from June 6, 1900, on its award of $2,067,166.

In order to avoid confusion in discussing the contentions of the parties to the cross appeals herein, we shall identify them as the Government and the Indians, respectively.

The original decision on the question of the Government's liability to the Indians in this case was rendered by the Indian Claims Commission on April 9, 1951 (1 Ind. Cl. Comm. 520, 528). The claim was asserted under Section 2 of the Indian Claims Commission Act, 60 Stat. 1049, on the ground that it was a claim which would arise if the so-called Jerome Agreement (authorized by Section 14 of the Act of March 2, 1889, 25 Stat. 890) were revised on the grounds of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or, in the alternative, that it is a claim based upon fair and honorable dealings. In its original findings and decision on the issue of liability, the Indian Claims Commission concluded that it did not need to determine whether or not the Jerome Agreement was obtained by fraud, duress, mistake, or was based upon unconscionable consideration because, in the opinion of the Commission, under ordinary principles of contract law the United States became liable to respond in damages for breach of its contract with the Indians. Although the reasoning of the Commission on this point appears to be somewhat obscure in

view of the fact that under the circumstances as outlined by the Commission there appears to have been no contract executed by the parties, we are of the opinion that the Commission has reached the correct result either because the Government was liable under a contract implied in fact (there having been no valid ratification by Congress of the 1892 Jerome Agreement), or because its conduct in connection with this matter did not comport with fair and honorable dealings.

Under the Treaty of October 21, 1867, 15 Stat. 581, 582, the United States ceded certain lands located in the state of Oklahoma to the Confederated Tribes of Kiowa and Comanche Indians described therein as follows:

> commencing at a point where the Washita river crosses the 98th meridian, west from Greenwich; thence up the Washita river, in the middle of the main channel thereof, to a point thirty miles, by river, west of Fort Cobb, as now established; thence, due west to the north fork of Red river, provided said line strikes said river east of the one hundredth meridian of west longitude; if not, then only to said meridian line, and thence south, on said meridian line, to the said north fork of Red river; thence down said north fork, in the middle of the main channel thereof, from the point where it may be first intersected by the lines above described, to the main Red river; thence down said river, in the middle of the main channel thereof to its intersection with the ninety-eighth meridian of longitude west from Greenwich; thence north, on said meridian line, to the place of beginning, * * *

By a separate treaty the Apache Tribe of Indians was incorporated with the Kiowa and Comanche Tribes of Indians and became entitled to share in the

benefits of the above described Reservation, 15 Stat. 589. Article XII of the Treaty of October 21, 1867, *supra*, (known as the Medicine Lodge Treaty) provided as follows:

> "No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians occupying the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in Article III [VI] of this treaty.

Pursuant to section 14 of the Act of March 2, 1889, 25 Stat. 980, the President of the United States appointed a Commission comprised of David H. Jerome, as Chairman, Warren G. Sayre, and Alfred M. Wilson, to negotiate an agreement with the Indians for the cession of the land described in the 1867 Treaty. The Commissioners ultimately negotiated such an agreement on the 6th day of October 1892, which agreement became known as the Jerome Agreement. The Agreement contained a provision that it would become effective *only* when ratified by the Congress of the United States. On October 22, 1892, the United States Commissioners transmitted the Agreement to the President, who in turn reported the Agreement to the Congress. There was apparently a good deal of dissatisfaction among the members of the Indian tribes with respect to the terms of the Agreement and the manner of its procurement, which dissatisfaction was communicated to officials in Washington from time to time. Congress took no action with respect to the Jerome Agreement until it passed the Act of June 6, 1900, 31 Stat. 672, 676. That Act was entitled "An Act to ratify an Agreement with

the Indians of the Fort Hall Indian Reservation in Idaho, and making appropriations to carry the same into effect." Section VI of that Act purported to quote verbatim and to ratify the Jerome Agreement made with the Kiowa, Comanche and the Apache Indians in 1892. However, the so-called ratification contained in the Act of June 6, 1900,[1] made a number of changes in the terms agreed to by the Indians and the Commissioners in the Jerome Agreement and such changes were never resubmitted to the Indians for acceptance or rejection as required by Article XII of the Treaty of October 21, 1867, quoted above. One of the changes made in 1900 concerned the classification of lands. The Jerome Agreement had provided that the land in the reservation should be classified as grain-growing land or as grazing land and that in making selection of the lands to be allotted in severalty, as provided elsewhere in the Agreement, each Indian should be required to take at least one-half of his or her allotment in land classified as grazing land. This provision was eliminated from the 1900 ratification and in its place Congress provided that the Secretary of the Interior should set aside for the use in common of the tribes 480,000 acres of grazing land to be selected by the Secretary of the Interior either in one or more tracts as should best subserve the interest of the Indians. As pointed out by the Indians, they were entitled under the Jerome Agreement to have their lands classified into grain-growing and grazing lands as an aid in making their selections. Whether, as contended by the Government, the change made in 1900 ultimately worked to the benefit of the Indians, or

[1] The terms of the ratifying legislation were further changed by the Act of January 4, 1901, 31 Stat. 727, the Act of March 3, 1901, 31 Stat. 1078, and the Act of March 3, 1901, 31 Stat. 1093, in which Congress, among other things, extended the time for making allotments and the opening of the surplus land to settlement.

whether it did not, the fact remains that the ratification of the Jerome Agreement was not in the terms of the original Agreement agreed to by the Indians and the United States Commissioners.

The Jerome Agreement also provided that the Indians were to receive $2,000,000 for their surplus lands to be paid for as follows: $200,000 in cash to be distributed per capita within 120 days after ratification of the Agreement; $200,000 to be paid under direction of the Secretary of the Interior, one year after the first payment; $100,000 to be paid one year following the second payment; interest at the rate of 5 percent on the remaining $1,500,000 was to be paid to the Indians per capita annually. In the 1900 ratification of the Jerome Agreement, Congress provided that $500,000 was to be distributed per capita at such times and in such manner as the Secretary of the Interior should deem to be for the best interests of the Indians. The 1900 legislation then provided that interest on the remaining $1,500,000 was to be paid to the Indians per capita annually only in the event that the Indians were successful in defending a lawsuit which Congress had authorized the Choctaw and Chickasaw Nations to bring in the Court of Claims to determine the rights of such Nations to a reversionary interest in the unallotted lands.

The Act of 1900 eliminated the name of the Indian agent and that of an Army officer which the Indians and the United States had agreed under the Jerome Agreement should be beneficiaries of that Agreement.

The Jerome Agreement had provided that sections 16 and 36 in each township should be withheld from allotment. The Act of 1900 provided that sections 13 and 33 of each township on the reservation should be withheld from allotment in addition to sections 16 and 36. Thus the 1900 legislation doubled the amount of land withheld from allotment. Although under the

1900 legislation individual Indians would still receive the amount of land as individual allotments guaranteed to them by the Jerome Agreement, the withholding of the additional sections from allotment might well have prevented family units from making selections of contiguous lands.

The 1900 legislation also provided that if the allotted lands contained minerals they should be open to location and entry under the mining laws of the United States. Despite the fact that this provision was never enforced, its inclusion in the 1900 legislation represented a material change in the Jerome Agreement.

We are of the opinion that the Indian Claims Commission was correct in ruling that Congress did not actually ratify the Jerome Agreement, which was in essence a contract between the Indians and the United States, because it was accepted in terms varying materially from the offer. The Government urges that the Indians are estopped from making such an argument because for years subsequent to the passage of the 1900 legislation the Indians *elected* to live within the terms of the 1900 law. As a matter of fact, the Indians did everything they could to escape the terms of the 1900 legislation. See *Lone Wolf* v. *Hitchcock*, 187 U.S. 553. As this court pointed out in *Sioux Tribe* v. *United States*, 125 C. Cls. 439, 443, the doctrine of acquiescence is hardly applicable to a dependent Indian tribe. *C. A. Moore, Survivor* v. *United States*, 32 C. Cls. 593, relied on by the United States, is distinguishable in that the Sioux Tribe in that case consented to the changes made by the Congress, and, along with the United States, regarded the unproclaimed treaty as being in effect. Furthermore, the *Moore* case was concerned with the rights of a white citizen of the United States to collect for an Indian

depredation alleged to have been committed by the Sioux Tribe, and the court held that under the circumstances of that case the *United States* could not complain that the treaty was ineffective merely because it had not been proclaimed.

The Commission held that the Indians herein are entitled to recover the difference between the value of the land acquired by the United States on June 5, 1900, and the purchase price paid therefor on that date. We are of the opinion that the Commission was correct in so holding either on the ground that the Indians are entitled to the fair market value of the land as damages for breach of a contract implied in fact, or as a measure of their recovery on the grounds of fair and honorable dealings. It would be helpful to the court, and perhaps to the parties, if the Commission would phrase its holdings on liability in the terms of section 2 of the Indian Claims Commission Act.

On the question of the amount of recovery, the Commission found that the land acquired by the United States in 1900 was worth, on an average, $2 per acre, whereas the Indians were paid approximately 98.3 cents per acre. In their cross-appeal the Indians urged that the evidence of record would support a valuation of $3.45 per acre, but the Indians concede that they are unable to show that the Commission's finding of $2 per acre is not supported by substantial evidence. The Government, on the other hand, urges that the Commission's findings are not supported by substantial evidence on the record as a whole and that the findings are not sufficiently basic and detailed to meet the tests laid down by this court in *Snake or Piute Indians* v. *United States*, 125 C. Cls. 241.

The record on valuation in the instant case is voluminous and represents careful and exhaustive prep

ration by the Indians and by the Government. Following the criteria suggested by this court in its decisions in *Rogue River Tribe of Indians* v. *United States*, 116 C. Cls. 454, cert. den. 341 U.S. 902 and in *Alcea Band of Tillamooks, et al.* v. *United States*, 115 C. Cls. 463, reversed on the matter of interest only, *United States* v. *Alcea Band, etc.* 341 U.S. 48, the Indian Claims Commission appears to have carefully analyzed the record on valuation and made sufficiently detailed primary findings to adequately reflect that record and to fully support the ultimate finding of $2 an acre for the land in question. We are of the opinion that the findings on valution are an adequate and accurate reflection of the evidence produced by the parties; that the burden of selecting from the conflicting evidence material upon which to base findings of fact has been admirably borne by the Commission and that its findings are supported by substantial evidence on the record as a whole and are therefore binding upon this court. The primary objection which the Government appears to have to the Commission's findings is that the Commission relied on some portions of the evidence rather than upon others. The choice which the Commission must make in a case such as this is not a simple one, but we are of the opinion that the choice it has made in each instance was the proper one.

On the matter of offsets, the Commission finally concluded that the Government had not succeeded in establishing any allowable offsets. The evidence submitted by the Government in support of its claim of offsets consisted of the usual voluminous report of the General Accounting Office. In accordance with the expressions of this court in *Quapaw Tribe, et al.* v. *United States*, 128 C. Cls. 45, the Indian Claims Commission has made a careful analysis of the reports of

the General Accounting Office and has concluded, with respect to some of the offsets, that the United States had failed to sustain the burden of proof necessary to show that the expenditures actually were made for the benefit of the tribe. In other instances, the Commission has held that the amounts expended were for the benefit of individual Indians rather than for the benefit of the tribe and were therefore not allowable as offsets against a judgment for the tribe on a tribal claim. Although the Government argues that the Commission was supplied with a second report from the General Accounting Office purportedly revised to supply facts held by this court to be essential in the *Quapaw* case *supra*, the Report is not conclusive and the issue of whether or not such facts have been supplied as would support the allowance of an offset, is a matter for the judicial determination of the Indian Claims Commission. The Commission has made numerous detailed findings relative to the proof of offsets. Those findings adequately reflect the record on this matter and are supported by substantial evidence. In its opinion of March 12, 1957 (5 In. Cl. Comm. 96), the Commission has carefully considered each item of offset claimed and, in our opinion, has correctly ruled against the allowance of any of the offsets.

On the matter of interest, the Indians urge that the Commission erred in not allowing interest as a part of the award. The Indians contend that although Congress had the power to take the surplus lands in question, Congress did not have the power to pay the Indians less than just compensation for the land which it took. The Indians concede that under the holding of the Supreme Court in *Lone Wolf v. Hitchcock, supra*, the acquisition by the United States of the land in question did not amount to a taking in the constitutional sense because of the plenary

power of Congress over tribal relations of the Indians and over Indian tribal property. The Court held that the Act of June 6, 1900 was merely the exercise of such Congressional plenary power. While, as pointed out by the Indians, it is difficult to distinguish between an act of Congress which passes title to Indian land without the consent of the tribal owners and for no consideration, and an act of Congress which passes title to Indian land without the consent of the owners for only a portion of its true value at the time of acquisition, we think that the issue regarding the allowability of interest is not actually before the court in this appeal. The petition of the Indians before the Indian Claims Commission does not state a claim arising under the Constitution; but rather a claim which would result if the Jerome Agreement were revised on the grounds of fraud, duress, unconscionable consideration, mutual or unilateral mistake; and a claim based upon fair and honorable dealings. This court has held that awards rendered on claims arising under those portions of section 2 of the Indian Claims Commission Act do not bear interest. *The Osage Nation of Indians* v. *United States*, 119 C. Cls. 592, 671. The same is true of a claim under a contract, which falls under that portion of section 2 of the Act providing for "all other claims in law or equity * * * with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit: * * *".

The final determination and award of the Indian Claims Commission in favor of the Indians, petitioners below, is affirmed.

It is so ordered.

LARAMORE, *Judge;* MADDEN, *Judge;* WHITAKER, *Judge;* and JONES, *Chief Judge,* concur.

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 3–57

(Decided October 8, 1958)

THE UNITED STATES

v.

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS

ON MOTION OF THE UNITED STATES FOR REHEARING

PER CURIAM: The appellant, the United States, has moved for reconsideration in connection with three points relative to the court's opinion of July 16, 1958, in the matter of offsets.

As its first ground, the United States urges that the 1,104 depredations judgments paid out of the United States Treasury were proper offsets from the judgment rendered by the Indian Claims Commission in favor of the Tribes, that the Commission erred in denying such payments as offsets, and that the court erred in affirming the decision of the Commission on this point.

The Indian Claims Commission Act makes the following provision with respect to the allowance of offsets:

> In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U.S.C. sec. 250), as amended; the Commission may also inquire into and consider all

money or property given to or funds expended gratuitously for the benefit of the claimant and, if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural area, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

The depredations judgments in question were judgments rendered by this court pursuant to the Act of March 3, 1891, 26 Stat. 851, which conferred jurisdiction on this court to inquire into and determine finally all claims for property of United States citizens taken or destroyed by Indians without cause and not returned or paid for. Section 6 of the Act of March 3, 1891, made the following provisions for the payment of any judgment so rendered:

> That the amount of any judgment so rendered against any tribe of Indians shall be charged

against the tribe by which, or by members of which the court shall find that the depredation was committed, and shall be deducted and paid in the following manner: First, from annuities due said tribe from the United States; second, if no annuities are due or available, then from any other funds due said tribe from the United States, arising from the sale of their lands or otherwise; third, if no such funds are due or available, then from any appropriations for the benefit of said tribe, other than appropriations for their current and necessary support, subsistence and education; and, fourth, if no such annuity, fund, or appropriation is due or available, then the amount of the judgment shall be paid from the Treasury of the United States: *Provided*, That any amount so paid from the Treasury of the United States shall remain a charge against such tribe, and shall be deducted from any annuity, fund or appropriation hereinbefore designated which may hereafter become due from the United States to such tribe.

All of the judgments in question were paid pursuant to the fourth alternative of section 6, i.e., from the Treasury of the United States, and it is the Government's contention that under the proviso of section 6 the amounts so paid are a charge against the Tribe and therefore are legal offsets to be deducted from the present judgment as a "fund" which has become "due from the United States to such Tribe."

In the Act of June 6, 1900, 31 Stat. 672, the land which was the subject of the instant claim before the Indian Claims Commission was ceded to the United States for the sum of $2,000,000, plus interest thereon. That Act provided that none of the money or interest thereon "which is, by the terms of the said agreement, to be paid to said Indians shall be applied to the payment of any judgment that has or may hereinafter be

rendered under the provisions of the Act of 1891, *supra*.

Under the provisions of 25 U.S.C. 126 (Act of July 15, 1871, 16 Stat. 335, 360, R. S. § 2098), no claim for Indian depredations could be paid until Congress should make a special appropriation therefor. Accordingly, each annual appropriation act (with one exception), commencing with the Act of July 28, 1892, 27 Stat. 282, 319, contained a provision for the payment of the depredation judgments in language substantially as follows:

> For payment of judgments of the Court of Claims in Indian depredation cases, * * * or so much thereof as may be necessary to pay and discharge such judgments as have been rendered against the United States after the deductions required to be made under the provisions of section six of the act approved March third, eighteen hundred and ninety-one, entitled "An act to provide for the adjustment and payment of claims arising from Indian depredations," shall have been ascertained and duly certified by the Secretary of the Interior to the Secretary of the Treasury, which certification shall be made as soon as practicable after the passage of this act, and such deductions shall be made according to the discretion of Secretary of the Interior, having due regard to the educational and other necessary requirements of the tribe or tribes affected and the amounts paid shall be reimbursed to the United States at such times, and in such proportions, as the Secretary of the Interior may decide to be for the interests of the Indian service.

The one exception mentioned above was the Act of August 26, 1912, 37 Stat. 595, 617–618, and in that Act Congress did not give the Secretary of the Interior discretion as to whether or not the United States

would be reimbursed for this depredation judgment paid out of the Treasury of the United States.

In the years following the Act of March 3, 1891, the Secretary of the Interior exercised the first discretion placed in him by that act and certified that there were no funds of the Tribe available for payment of depredations "due regard being had to their educational and other necessary requirements." The Secretary also exercised the further discretion conferred upon him by the subsequent appropriation acts (except for the year 1912) and decided that it was not in the "interests of the Indian service" to reimburse the United States for the depredation judgments which had been paid out of the Treasury of the United States. In the fiscal year 1912 a depredation judgment in the sum of $719 was paid by the United States and in the appropriation act authorizing such payment the Secretary was not specifically given discretion to withhold reimbursement in "the interests of the Indian service."

The Indian Claims Commission decided that the depredation judgments paid out of the Treasury of the United States were not legal offsets because, although by the 1891 Act they were made a charge against the Tribe to be deducted from any sum becoming due from the United States to the Tribe, Congress had vested sole discretion in the Secretary of the Interior to determine whether or not such reimbursement should be made from tribal funds out of annual appropriations for such purposes. It was the opinion of the Commission that the depredation judgments were not legal offsets and that the Commission had no jurisdiction to review the actions of the Secretary taken in the exercise of his discretion. With respect to the $719 paid by the United States in 1912, the Commission ruled that this payment did not constitute a legal offset

because, under the Act of June 6, 1900, supra, money paid to the Indians for the land ceded under that Act could not and should not be used for the payment of depredations judgments. The Commission suggested that this same ground would apply equally to all depredation judgments which had been paid by the United States.

We are of the opinion that the Commission was correct in holding that the reimbursement of the United States from tribal funds for payment of the Indian depredation judgments was a matter committed by Congress to the sole discretion of the Secretary of the Interior and that he had exercised his discretion as to all but one such judgment. We are further of the opinion that as to all but the 1912 depredation judgment appropriations, the issue of reimbursement is closed.

With respect to the payment of the $719 in 1912, the Secretary lacked discretion to withhold reimbursement in the "interests of the Indian Service" and unless the judgment in this case can be said to be money which by the terms of the 1900 agreement was to be paid to the Indians, that $719 would, under the proviso of section 6 of the 1891 Act, be a charge against the Tribe and therefore a proper offset. We think it is not such a proper offset.

The claim in this case is one arising under section 2 of the Indian Claims Commission Act, i.e., a claim resulting where the agreement of 1900 between the Indians and the United States is revised on the ground of unconscionable consideration. While it is clear that in the 1900 Act Congress may have been speaking about the $2,000,000, plus interest which the Indians would receive for their land when it spoke about the "money or interest thereon which is, by the terms of said agreement, to be paid to such Indians,"

we are of the opinion that the judgment in this case *is* money which is to be paid to the Indians pursuant to the 1900 agreement revised on the ground that the consideration provided for therein was unconscionable; otherwise there would be no basis for the claim. Accordingly, we hold that none of the depredation judgments paid by the United States and not reimbursed by the Secretary of the Interior, are legal offsets applicable to the judgment of the Commission in this case.

The United States further asks for a reconsideration on the matter of the allowability as an offset of cash payments to individual indigent Indians. The Commission held that payments to individual Indians were not proper offsets against a judgment in favor of the tribe and this court affirmed that holding. Defendant points to the fact that in our decision in *Quapaw Tribe* v. *United States*, 128 C. Cls. 45, the court held that the payment of board and funeral expenses of indigent Indians was a proper offset. In the same decision, however, this court held that presents to individual Indians did not constitute proper offsets against a judgment rendered on a tribal claim. Obviously, the two rulings were inconsistent and this inconsistency was discovered and briefed to the Commission in the course of the trial of the instant case. The Commission rightly determined to follow our ruling with respect to presents to individual Indians, and we affirmed that determination. To the extent that our holding is in conflict with our ruling in the *Quapaw* case respecting board and funeral expenses to individual Indians, that holding is overruled.

Finally, the United States contends that the Commission erred in refusing to apply the practice of prorating expenditures for the joint benefit of all the tribes under a single agency. Inasmuch as no offset

able items have been established by the United States in this case, there is no need for the court to pass on the issue of proration.

For the reasons set forth above, the motion of the United States for reconsideration is denied.

It is so ordered.

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BRIEF FOR THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS IN OPPOSITION

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Office-Supreme Court, U.S.
FILED
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 664

THE UNITED STATES OF AMERICA, *Petitioner*

v.

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS IN OPPOSITION

J. ROY THOMPSON, JR.
505 Union Trust Building
Washington 5, D. C.

W. C. LEWIS and
FRANK MISKOVSKY
820 Hightower Building
Oklahoma City, Oklahoma
Attorneys for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 664

THE UNITED STATES OF AMERICA, *Petitioner*

v.

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the United States may, under the Indian Claims Commission Act, reimburse itself out of a joint award in favor of the three respondent tribes for payments made by the United States to citizens because of depredations committed by lawless individ-

ual Indians, members of some of the respondent tribes, when the reimbursement of such payments has been, by statute, placed in the sole discretion of the Secretary of the Interior?

2. Whether payments made by the United States to some individual indigent tribal members may be offset, under said Act, against the joint tribal judgment?

STATUTES INVOLVED

In addition to the statutes recited by the United States, the following are involved:

Section 4 of the Act of July 15, 1879, 16 Stat. 366, Revised Statutes 2098, 25 U. S. C. 426, provides in pertinent part:

> "No part of the monies which may be appropriated * * * to be used and expended for the care and benefit of any tribe or tribes of Indians, shall be applied to the payment of any claim for depredations that may have been or may be committed by such tribe or tribes, or any member or members thereof. No claims for Indian depredations shall be paid until Congress shall make a special appropriation therefor."

Section 6 of the Act of June 6, 1900, 31 Stat. 672, 680, provides:[1]

> "That none of the money or interest thereon which is, by the terms of the said agreement, to be paid to said Indians shall be applied to the payment of any judgment that has been or may hereafter be rendered under the provisions of the Act of Congress approved March third, eighteen hun-

[1] The United States incorrectly refers to this legislation as being Article XI of the Jerome Agreement (Pet. 7, 8).

dred and ninety-one, entitled 'An Act to provide for the adjudication and payment of claims arising from Indian depredations.'"

Section 1503, Title 28, U. S. C. (formerly 28 U. S. C. 250, with some change in wording) provides:

"The Court of Claims shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court."

STATEMENT

The Indian Claims Commission awarded the Kiowa, Comanche and Apache Tribes $2,067,166 because the United States in 1900 acquired 2,033,583 acres of jointly owned tribal land in southwestern Oklahoma, without the proper consent of the tribes and at less than half of its true value. On appeal the Court of Claims affirmed the award. The United States does not here challenge the propriety of the judgment. The Government asserts that the Commission was legally obligated, under the Indian Claims Commission Act, to offset against the award the sum of $1,561,368, which the United States many years ago paid to non-Indians because of depredations committed by some individual members of some of the respondent tribes. It also asserts that the Commission should have exercised its discretion to offset $396,844.96 paid by the United States to some individual, indigent Indians, in lieu of the normal county or state program of payments available to non-Indians.

ARGUMENT

The tribes will show in this brief, (1) that no question is present in this case that requires review; (2) that the case does not call for an exercise of this

Court's supervisory jurisdiction; (3) that the Court of Claims was correct in affirming the denial of the claimed offsets.

1. *No question is present in this case that requires review.* The United States urges that this Court assume jurisdiction of this case because offsets against awards are "important" (Pet., pp. 10, 23, points 1 and 4), and suggests that large sums of money are involved (Pet. 23). It is suggested that any reduction in a proper award to a wronged Indian tribe is important but this, in itself, is not sufficient to invoke this Court's jurisdiction. The Government admits "there can be no conflict of decision within the rules of this Court." (Pet. 23).

2. *The case does not call for an exercise of this Court's supervisory jurisdiction.* When Congress set out to provide for the final disposition of all long-standing tribal grievances, it created the Indian Claims Commission, and provided for appellate review in the Court of Claims. Upon such review the Commission's findings of fact are "conclusive" if "supported by substantial evidence", and said Court has "exclusive jurisdiction" to determine whether the conclusions of law "are valid and supported by the Commission's findings of fact." (Sec. 20, Act of August 13, 1946, 60 Stat. 1049, 25 U. S. C. 70s).

The matters urged on this petition were the subject of exhaustive consideration by the Commission and the Court of Claims.[2] The claimed offsets were denied by

[2] The Indian Claims Commission made findings of fact on two occasions and wrote two opinions on the subject (App. 1-8; 71-116) and the Court of Claims wrote two opinions on offsets (Appendix, 25-43). App. refers to nine copies of the record filed by United States in this case and Appendix refers to the Appendix to the petition for writ of certiorari in No. 664.

a unanimous Commission and Court of Claims. The experience and skill of the Commission and the Court of Claims on these cases is well known. Both bodies demonstrated in this case an adherence to the basic principles underlying the Indian Claims Commission Act. It is significant that this Court has never once granted certiorari in a case where the Court of Claims has acted in its appellate capacity under the Indian Claims Commission Act. A list of all such cases is included as Appendix A to this opposition. This case presents no special problems requiring the exercise of supervisory power over the actions below.

3. *The Court of Claims was correct in affirming the denial of the claimed offsets.* The decisions of the Commission and the Court of Claims are plainly correct and there are additional valid reasons in support thereof.

a. *Depredation payments may not be offset.* Both the Commission and the Court of Claims found that the payments made by the United States for depredations of some tribal members were reimbursable to the Government only in accordance with the various appropriation acts providing for such payments which provided that "the amounts paid shall be reimbursed to the United States at such times, and in such proportions, as the Secretary of the Interior may decide, to be for the interests of the Indian service."[5] The

[5] See appropriation Acts for fiscal years 1892, 27 Stat. 282, 319; 1894, 28 Stat. 476, 477; 1895, 28 Stat. 843, 869; 1896, 29 Stat. 267, 306; 1897, 30 Stat. 105, 141-142; 1898, 30 Stat. 652, 690-691; 1899, 30 Stat. 1214, 1245; 1900, 31 Stat. 7, 26-27; 31 Stat. 280, 317; 1901, 31 Stat. 1010, 1051-1052; 1902, 32 Stat. 5, 27-28, 32 Stat. 552, 584-585; 1903, 32 Stat. 1071, 1070-1071; 1904, 33 Stat. 15, 41-42; 32 Stat. 394, 423; 1905, 33 Stat. 1214, 1250-1251; 1906, 34 Stat. 27, 44-45; 34 Stat. 634, 664-665; 1907, 34 Stat. 1371, 1400;

Commission and the Court both held that as the Secretary of the Interior had already exercised this discretion in favor of the tribes they could not substitute their judgment for his. The Commission stated it had

> "no power to review the action of the Secretary and exercise for him, or in his stead, the discretionary powers vested in him, and none other, by plain law, a discretion, it may be remarked, that has never been questioned by the Congress during the upwards of sixty-five years the Secretary has similarly acted in thousands of depredations cases under identical statutes." (App., 101)

The Court of Claims agreed and concluded that under those facts "the issue of reimbursement is closed." (Appendix 41).

The Commission and the Court might also have based their denial of depredation offsets on other equally valid grounds. (8) The depredations were committed by individual lawless members of some of the tribes. None were committed by the tribes themselves, nor was any depredation committed by members of all three tribes. The obligation was individual not tribal. *Labadie, Admr.* v. *United States et al*, 33 C. Cls. 476, 479. To require the joint tribal judgment to bear the burden of individual misdeeds is an unconstitutional deprivation of property without due process

1908, 35 Stat. 478, 514-515; 1909 35 Stat. 907, 938; 1910, 36 Stat. 202, 218; 36 Stat. 774, 808; 1911, 36 Stat. 1289, 1290; 1913, 37 Stat. 912, 934; 38 Stat. 208, 228-229; 1914, 38 Stat. 312, 329; 38 Stat. 559, 576; 1915, 38 Stat. 1138, 1154-1155; 1916, 39 Stat. 14, 27; 39 Stat. 801, 823; 1917, 40 Stat. 1, 29; 40 Stat. 345, 378; 1918, 40 Stat. 821, 837; 1919, 41 Stat. 35, 60. The Appropriation Act for fiscal year 1942, 37 Stat. 595, 617-618, differed from the above acts but as the amount involved for that year is only $719, and as it is not urged by the Government, the special arguments on this point will not be set out.

and without just compensation. (2) The United States may not under 28 U. S. C. 1503, offset claims of one joint claimant against the joint claim. *Marietta Manufacturing Co. et al* v. *United States*, 61 C. Cls. 122; *Bochm* v. *United States*, 20 C. Cls. 241.

Petitioner's arguments on depredations are unsound. Petitioner's contention that it is necessary to offset depredations "in order to promote peaceful relations" (Pet. 12) is an anachronism. While the Government supplied no proof on the point, all such depredations must have been committed prior to the Indian Depredation Act of 1891. Just how offsetting these depredation payments today would "promote peaceful relations" is not disclosed. The contrary is more likely.

While the United States notices various treaties with respondent tribes (Pet. 12) it is significant that no claim is made that they are the basis of any tribal liability for the offset here asserted.

The repeated and insistent claim that Congress provided that the depredation payments "shall remain a charge against such tribe" (Pet. 13, 15) completely overlooks the fact that Congress changed this clause in each appropriation act (except one) for the next 27 years here involved (1892-1919). Certainly Congress had the power to do this. *United States* v. *Dickerson*, 310 U. S. 554, 555.

The argument that the rights of the United States are those of a guarantor that has discharged a debt (Pet. 14) is deficient in law. In the first place, the United States was a volunteer, and, as such, has no right of recoupment. In the second place its rights, if any, are only against the individual depredators, not his tribe. *Labadie Admrs* v. *United States*, 33

C. Cls. 476, 479. A similar contention was rejected by this Court in the case of *United States* v. *Plesha*, 352 U.S. 202, footnote 4, p. 204, where this Court said, "Where no debt exists there is no basis for applying the common-law rules of guaranty."

The argument that the Secretary of the Interior did not have this award in mind when he exercised his discretion (Pet. 14-15) is beside the mark. The fact is that during the times the discretion was being exercised by the Secretary (1900-1919) the respondent tribes had a total of $936,658 available from the proceeds of labor and $3,951,376 from the proceeds of land (Pet. Exs. 143-1 through 143-23), or more than three times the amount here involved.

The assertion that Congress, in enacting the Indian Claims Commission Act in 1946, must have intended to import into the Act the allowance of depredations as offsets as was done in the case of *Duwamish, et al Indians* v. *United States*, 79 C. Cls. 530, 612-613, is amazing (Pet. 18). In the *Duwamish* case depredation payments were offset, as the Court of Claims said "in the absence of some affirmative record from the Interior Department." (p. 613) In the instant case the affirmative record from the Interior Department was furnished (Pet. Exs. 127-139). This record supplied the deficiency noted in the *Duwamish* case and showed the exercise of the discretion by the Secretary of the Interior that is completely dispositive of this phase of the case. Even the Government does not assert such exercise was arbitrary, unreasonable or capricious.

b. *Cash payments to individual indigent Indians may not be offset.* The United States complains because the Indian Claims Commission and the Court of Claims agreed that cash payments totaling

$396,844.96 to individual needy Indians were not proper offsets against the tribes. These disbursements were made from appropriations for the health, welfare, support or rehabilitation of needy Indians generally throughout the United States. The disbursements were made to individual members of the respondent tribes on the basis of individual needs only after an investigation by social workers employed by the United States. To be eligible for these cash payments, it was necessary for the individual to show his need for the payments. In none of the Acts from which the disbursements were made was it required that the tribes of which the individuals were members reimburse the Government for such outlays, nor did the respondent tribes request the aid for its indigent members or assume any obligation to reimburse the United States therefor. The monies were not paid to the respondent tribes, but only to some individual members thereof in need and who required financial assistance (App. 2-3). In short, these were payments required to be made because the State and counties refused to make the same provisions for Indians that they did for non-Indian citizens. To require Indians to repay such funds would be to impose upon them an obligation that has never been imposed upon non-Indian citizen recipients of the same type of funds. No such discrimination should be permitted.

The Indian Claims Commission found as a fact that these payments were made on an individual basis and did not constitute a tribal benefit (App. 126). Only gratuities for "the benefit of the claimant," the tribes, may be offset under the Indian Claims Commission Act. The Court of Claims affirmed, stating:

"The Commission has made numerous detailed findings relative to the proof of offsets. Those

findings adequately reflect the record on this matter and are supported by substantial evidence." (Appendix 34).

Ordinarily facts found by one Court and approved on appeal are not subject to further review. *Graver Manufacturing Co.* v. *Linde*, 336 U. S. 271, 275, on rehearing, 339 U. S. 605.

In addition, the Indian Claims Commission Act provides that if findings of fact of the Commission are supported by substantial evidence "they shall be conclusive". This matter should not be open now for further review.

The Government, nevertheless, seeks an additional review of the factual conclusion of the Commission. To support its request, it makes reference to numerous decisions of the Court of Claims on gratuities (Pet. 18-19). In no cited decision were cash payments to indigent Indians allowed as offsets. In the cases which the Government contends are analogous there was an express or implied factual finding of tribal benefit to justify the offset. In the instant case there was an express finding that there was no tribal benefit. The difference is fundamental, and the decision below was correct.

The United States argues that Congress failed to distinguish between individual benefits and tribal benefits as gratuitous offsets (Pet. 21). The short answer to this contention is that Congress could have provided that gratuitous expenditures for individual Indians could have been offset as they had previously done. See 41 Stat. 623 (Klamath); 44 Stat. 555 (Chippewa); 44 Stat. 801 (Pottawatomie); 44 Stat. 807 (Crow); 44 Stat. 1263 (Assiniboine); 45 Stat.

1027 (Winnebago); 45 Stat. 1249 (Nez Perce); and 47 Stat. 137 (Cherokee). The care with which Congress restricted the offsets to item "for the benefit of the claimant," i.e., the tribal petitioners below, as shown by the legislative history of the offset provisions of the Indian Claims Commission Act (App. 118-121), is a complete rejection of this argument.

Other valid grounds support the denial of these cash payments as offsets. (1) Expenditures beyond the date of filing the claim may not be considered by the Commission. The petition in this case was filed before the Indian Claims Commission on August 9, 1948. The cash payments for indigent Indians subsequent to that date total $396,423.96. The tribes contend that expenditures beyond the date of filing the petition before the Commission may not be considered. It must be obvious that there should be some time beyond which continuing expenditures by the United States may not be claimed as offsets. To allow such expenditures to be claimed places in the hands of the United States a means whereby a delay in the trial of Indian cases before the Commission can result in accumulation of enormous offsets, and if they are accepted, defeat an award which is necessarily based upon amounts that are fixed by prior events. Under the practice before the Commission, offsets are not even considered by the Commission until after a finding on liability and damages has been made.[4] The General Accounting Office routinely makes an elaborate study of the accounts between the United States and the tribe and it

[4] Rule 22f of the Commission provides: "In every case, unless otherwise ordered, the hearing before the Commission, * * * shall be limited to the issue of fact and law relating to the right of the plaintiff to recover."

is only after this study is completed that the United States asserts its offsets. Years elapse, in many instances, before the United States is in a position to assert offsets. The evidence in this case shows that approximately three and one-half years was spent by the Government in making the reports used in the case (Tr. 1320, 1317). In the meantime, routine expenditures are being made by the United States through the Bureau of Indian Affairs. Under the circumstances, the longer the United States delays presentation of offset evidence, the more expenditures it has to claim as offsets. The unfairness is obvious.

The instant case is a good example of the inherent injustice of this procedure. The petition in this case was filed August 9, 1948. On April 9, 1951, the Commission made an interlocutory order holding the United States liable (App. 9) and on December 13, 1955, made an interlocutory order that the tribes should recover $2,067,166, subject to offsets (App. 10-11). On April 11, 1956, the General Accounting Office submitted a report which the United States used as the basis for its offset claims. This report was an account of expenditures through June 30, 1951 and set out cash payments to indigent Indians in the amount of only $85,693.90 (Def. Ex. 26). The hearing on offsets commenced on August 1, 1956. At this hearing on August 1, 1956, the Government sought and obtained leave to amend its answer asserting offsets, to include additional gratuities for cash payment to individual indigent Indians in the amount of $311,151.06 for the fiscal years 1952 through 1956 (Tr. 1304-1319). The explanation was made that the General Accounting Office had just concluded its report concerning these expenditures. (Tr. 1304, 1317-1318)

Generally the rights of litigants, both plaintiffs and defendants, are fixed as of the time of filing suit; and this is true of set-offs, counterclaims and reimbursements. *Scott* v. *Armstrong*, 146 U. S. 499; *Rothensies* v. *Electric S. B. Co.*, 329 U. S. 296. The Court of Claims in the case of *Sioux Tribe* v. *United States*, 105 C. Cls. 725, provided a "cut-off" date in favor of the United States and refused to allow the Sioux tribe to amend its claim against the United States to add amounts which it asserted were accumulating under a continuing wrong. The Court said: "There must be an end to the cases. We cannot keep them open indefinitely * * * ". (p. 811). In view of the liberal construction that should be given to the beneficent aims of the Indian Claims Commission Act, there is no reason to enforce a rule against Indian tribes not applicable to ordinary litigants.

All tribal claims cannot be adjudicated at once. If the United States is allowed to assert offsets beyond the date of the filing of the claim, the tribe whose day in Court is delayed, for one reason or another, finds itself faced with offsets which another tribe whose litigation has been completed has not been required to pay. This places a premium on swiftness of litigation inconsistent with principles of justice.

(2) These cash payments, in any event, are discretionary offsets. The Indian Claims Commission Act provides that gratuitous expenditures may be set off against an award if the Commission "finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action". As the Commission and the Court below both agreed that the payments to individual indigent Indians were not

tribal benefits, necessarily no consideration was given, nor finding made, with respect to the nature of the claim and the entire course of dealings and accounts between the United States and the tribes and no finding whether "in good conscience" such payments should be offset. Assuming *arguendo,* that such payments are tribal benefits, it is obvious that before they may be offset against the award, the Commission must be allowed to exercise the discretion given to it by the Indian Claims Commission Act just referred to.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. Roy Thompson, Jr.
505 Union Trust Building
Washington 5, D. C.

W. C. Lewis and
Frank Miskovsky
820 Hightower Building
Oklahoma City, Oklahoma

Attorneys for Respondent

February, 1959

APPENDIX A

Table Showing Action by the Supreme Court of the United States on Petitions for Writs of Certiorari to the Court of Claims on All Indian Cases Appealed From the Indian Claims Commission*

Title of Case	Action by Supreme Court
1. Eastern (Emigrant) Cherokee Indians, ex rel. Nash v. U. S.	Certiorari denied, 340 U.S. 903
2. Western (Old Settler) Cherokee Indians, ex rel. Owen v. U. S.	Certiorari denied, 340 U.S. 904
3. U. S. v. Loyal Band or Group of Creek Indians	Certiorari denied, 342 U.S. 813
4. U. S. v. Osage Nation of Indians	Certiorari denied, 342 U.S. 896
5. Choctaw Nation v. U. S.	Certiorari denied, 343 U.S. 955
6. U. S. v. Risling (Indians of California)	Certiorari denied, 344 U.S. 856
7. U. S. v. Clyde F. Thompson (Indians of California)	Certiorari denied, 344 U.S. 856
8. Creek Nation v. C. W. McGhee; U. S. v. McGhee	Certiorari denied, 344 U.S. 856
9. Blackfeet and Gros Ventre Tribes of Indians v. U. S.	Certiorari denied, 348 U.S. 835
10. Assiniboine Indian Tribe v. U. S.	Certiorari denied, 348 U.S. 863
11. U. S. v. Otoe & Missouria Tribe of Indians	Certiorari denied, 350 U.S. 848
12. Choctaw Nation v. U. S.	Certiorari denied, 352 U.S. 825
13. Joseph Chitto, ex rel. Choctow Indians East of Mississippi River v. U. S.	Certiorari denied, 352 U.S. 841
14. Yuchi (Euchee) Tribe of Indians, et al. v. U. S.	Certiorari denied, 352 U.S. 1016 Rehearing denied, 353 U.S. 919 Rehearing denied, 353 U.S. 948
15. Ingraham Billie, ex rel. Miccosukee Seminole Indians v. Seminole Indians of the State of Florida	Certiorari denied, 355 U.S. 843

*In addition to the case at bar, there is one other case pending before this court on petition for writ of certiorari (No. 627, October, 1958 Term, Prairie Band of Potowatomie). The Court of Claims has disposed of 25 cases on appeal from the Indian Claims Commission without resort being had to this court. Four such appeals are now pending in the Court of Claims.

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JAN 26 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 665

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS,
Cross-Petitioners,

v.

THE UNITED STATES OF AMERICA, *Cross-Respondent.*

PETITION FOR A CROSS-WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

J. ROY THOMPSON, JR.
505 Union Trust Building,
Washington 5, D. C.

W. C. LEWIS and
FRANK MISKOVSKY,
820 Hightower Building,
Oklahoma City, Oklahoma.

Attorneys for Cross-Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS;
Cross-Petitioners,

v.

THE UNITED STATES OF AMERICA, *Cross-Respondent.*

PETITION FOR A CROSS-WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Kiowa, Comanche and Apache Tribes of Indians pray that a cross-writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on July 16, 1958.

OPINION BELOW

The opinion of the Court of Claims, which is the subject of this cross-writ of certiorari, is reported at 163 F. Supp. 603 (Appendix A, *infra*, pp. 1a-11a); and the opinion denying the motion of the United States for rehearing is reported at 166 F. Supp. 939 (Appendix B, *infra*, pp. 11a-17a).

JURISDICTION

The original judgment of the Court of Claims, affirming the Indian Claims Commission award to cross-petitioners, was entered July 16, 1958. Petition for rehearing by the United States was denied on October 8, 1958. On January 3, 1959, an order was entered by Chief Justice Warren, extending the time for filing a cross-petition for a writ of certiorari, to and including February 5, 1959.

The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTION PRESENTED

Whether, when the United States takes Indian tribal lands by legislative fiat without the consent of the tribes and pays the tribes less than one half the value of said lands, it has an obligation, in addition to paying the tribes the full value of said lands, to make the tribes whole by also paying an increment equivalent to interest to cover the delay in such payment.

STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in part:

> "* * * nor shall private property be taken for public use, without just compensation."

Article 12 of Treaty of October 21, 1867, 15 Stat. 581, provided:

> "No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult

male Indians occupying the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in Article III (VI) of this treaty."

Section 6 of the Act of June 6, 1900, 31 Stat. 672, the Act by which the tribal lands here in question were acquired, appears in full at pages 19-20 in the Appendix to Brief of Appellant, filed in the Court of Claims below in Appeals Docket No. 3-57 and nine copies of which have been filed here by cross-respondent under Paragraph 4 of Rule 21 of this Court (hereinafter cited as App.).

Pertinent portions of Sections 2 and 20 of the Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. 70a, 70s, are printed in Appendix C, *infra*, pp. 18a, 19a.

STATEMENT

This is a claim by the Kiowa, Comanche and Apache Tribes of Indians under the Indian Claims Commission Act, 60 Stat. 1049. Under the Act of June 6, 1900, 31 Stat. 672, the United States acquired 2,033,583 acres of tribal lands in what is now southwestern Oklahoma. The price paid by the United States, as set out in said Act of June 6, 1900, was $2,000,000. The Indian Claims Commission, upon complaint of the tribes, held that the tribes had never agreed to the terms of this legislation and, therefore, that they were entitled to recover the difference between the value of the lands and the price paid (App., p. 38); that its value on June 6, 1900, was $4,067,166 (App., p. 10-11); and that there were no off-sets or gratuities which should be charged against the net judgment of $2,067,166, in favor of the tribes (App., p. 8). No

interest or increment measured by interest was allowed to cross-petitioners (App., p. 8).

The United States appealed to the Court of Claims on the issues of liability, value and off-sets (Appendix B, *infra*, pp. 1a, 2a). The tribes cross-appealed on the ground of value and interest (Appendix B, *infra*, p. 2a).

The Court of Claims affirmed the Indian Claims Commission in all particulars and denied the motion of the United States for a rehearing.

On the question of interest, the Court of Claims held that no constitutional question was presented and, hence, no interest was allowable (Appendix A, *infra*, pp. 9a, 10a).

REASONS FOR GRANTING THE CROSS-WRIT

1. This case presents an important question of federal law which should be decided by this Court. The case of *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, represented an early effort by cross-petitioner tribes to obtain redress for the acquisition of their tribal lands by the Act of June 6, 1900. In that case, this Court held that the acquisition of the same lands by the same means which are the subject of the litigation below was the exercise of the plenary power of Congress over Indian tribal property; and that the courts, therefore, were powerless to intervene, regardless of the wrong. As the result of the instant litigation in the Indian Claims Commission, as affirmed by the Court of Claims, it has now been judicially determined that the United States paid only 98.3 cents per acre in 1900, for land then worth $2.00 per acre. It is submitted that *the Lone Wolf case* should be reviewed and overruled to the extent that it holds that the taking of

tribal property without the consent of the tribe, at a value less than its true worth, does not represent a taking requiring, because of the delayed payment, the addition of an increment to make the parties whole.

2. The decision of the Court of Claims as to interest is contrary to decisions of this Court and the Court of Claims. The affirmed decision of the Indian Claims Commission held that the act of June 6, 1900, was, as to the tribes, "inoperative" and that the acquisition of the land here in question was "in disregard of the rights of the Indians under the Treaty of October 21, 1867" (App., p. 38). The decision of this Court in the case of *United States* v. *Blackfeather*, 155 U.S. 180, at page 191, upheld the payment of 5% interest to a tribe of Indians when the funds to which the tribe was entitled were not paid over when they should have been. This decision should be followed in the instant case, rather than *the Lone Wolf decision*.

The Court of Claims in the case of *Confederated Bands of Ute Indians* v. *United States*, 100 C. Cls. 413, 432, held that payment for tribal lands taken by legislative fiat should be as of the time of the taking. In *the Ute case* there was no payment provided for in the Act of Congress which passed title without the consent of the Indians. In the instant case there was a payment of less than one half the value provided in the Act of Congress which passed title without the consent of cross-petitioners. The distinction is hardly one of principle. The Court of Claims recognized this logical conflict when it stated:

> "While, as pointed out by the Indians, it is difficult to distinguish between an act of Congress which passes title to Indian land without the consent of the tribal owners and for no consideration,

> and an act of Congress which passes title to Indian land without the consent of the owners for only a portion of its true value at the time of acquisition, we think that the issue regarding the allowability of interest is not actually before the court in this appeal."[1]

The Indian Claims Commission (App., p. 134, et seq.) and the Court of Claims (Appendix B, *infra*, p. 10a) both recognized that *the Lone Wolf case*, unless modified, precluded payment of an increment measured by interest to the tribes. *The Lone Wolf case* is inconsistent with later pronouncements of this Court, where tribal lands are taken by the United States. *Shoshone Tribe* v. *United States*, 299 U.S. 476; *United States* v. *Creek Nation*, 295 U.S. 103. These later cases, which allowed an increment to make the payment contemporaneous with the acquisition, should be followed rather than *the Lone Wolf case* and the decisions below.

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[1] This language regarding the power of the Court of Claims to decide the point obviously overlooks Section 13 (b) of the General Rules of Procedure of the Indian Claims Commission, as follows:

> "Which issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues."

The tribal attorneys sought interest at every stage of the trial below. The Indian Claims Commission passed on the request for interest on the merits at the trial and on rehearing (App., pp. 132-135). Under the circumstances, the question was before the Court of Claims, and that Court was in error in seeming to conclude to the contrary.

The failure of the Indian Claims Commission and the Court of Claims to follow the law laid down in these cases so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this petition for a cross-writ of certiorari should be granted.

Respectfully submitted,

J. Roy Thompson, Jr.
505 Union Trust Building,
Washington 5, D. C.

W. C. Lewis and
Frank Miskovsky,
820 Hightower Building,
Oklahoma City, Oklahoma.

Attorneys for Cross-Petitioners

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

Appeal 3-57

(Decided July [illegible], 1958)

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS

v.

THE UNITED STATES

Mr. W. Braxton Miller, with whom was *Mr. Assistant Attorney General Perry W. Morton*, for appellant, *The United States*. *Mr. Ralph A. Barney* was on the briefs.

Mr. J. Roy Thompson, Jr. for cross appellant, *The Kiowa, Comanche and Apache Tribes of Indians*. *Messrs. W. C. Lewis* and *Frank Miskovsky* were on the brief.

ON APPEALS FROM THE INDIAN CLAIMS COMMISSION

LITTLETON, *Judge*, delivered the opinion of the court:

This is an appeal by the United States from a final determination of the Indian Claims Commission in Docket No. 32, dated March 12, 1957, as amended, on July 18, 1957, in which the Commission, after making findings of fact and rendering an opinion, held that the United States was liable to the petitioners for the difference between the value of certain land and the price paid to petitioners therefor. The Government takes the position that the Commission erred as a matter of law in finding that the United States was liable to the petitioners under the circumstances of this case; that the Commission's findings of fact on the issue of value are either inadequate or not supported by substantial evidence on the record as a whole; and that the Commission erred

as a matter of fact and law in disallowing all offsets claimed by the United States.

The Kiowa, Comanche and Apache Tribes of Indians, petitioners below, have filed a notice of cross appeal urging that the Commission erred in finding too low a value per acre for the land acquired by the United States in 1900, and that the Commission erred as a matter of law when it did not allow interest from June 6, 1900, on its award of $2,067,166.

In order to avoid confusion in discussing the contentions of the parties to the cross appeals herein, we shall identify them as the Government and the Indians, respectively.

The original decision on the question of the Government's liability to the Indians in this case was rendered by the Indian Claims Commission on April 9, 1951 (1 Ind. Cl. Comm. 520, 528). The claim was asserted under Section 2 of the Indian Claims Commission Act, 60 Stat. 1049, on the ground that it was a claim which would arise if the so-called Jerome Agreement (authorized by Section 14 of the Act of March 2, 1889, 25 Stat. 890) were revised on the grounds of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or, in the alternative, that it is a claim based upon fair and honorable dealings. In its original findings and decision on the issue of liability, the Indian Claims Commission concluded that it did not need to determine whether or not the Jerome Agreement was obtained by fraud, duress, mistake, or was based upon unconscionable consideration because, in the opinion of the Commission, under ordinary principles of contract law the United States became liable to respond in damages for breach of its contract with the Indians. Although the reasoning of the Commission on this point appears to be somewhat obscure in view of the fact that under the circumstances as outlined by the Commission there appears to have been no contract executed by the parties, we are

of the opinion that the Commission has reached the correct result either because the Government was liable under a contract implied in fact (there having been no valid ratification by Congress of the 1892 Jerome Agreement), or because its conduct in connection with this matter did not comport with fair and honorable dealings.

Under the Treaty of October 21, 1867, 15 Stat. 581, 582, the United States ceded certain lands located in the state of Oklahoma to the Confederated Tribes of Kiowa and Comanche Indians described therein as follows:

> commencing at a point where the Washita river crosses the 98th meridian, west from Greenwich; thence up the Washita river, in the middle of the main channel thereof, to a point thirty miles, by river, west of Fort Cobb, as now established; thence, due west to the north fork of Red river, provided said line strikes said river east of the one hundredth meridian of west longitude; if not, then only to said meridian line, and thence south, on said meridian line, to the said north fork of Red river; thence down said north fork, in the middle of the main channel thereof, from the point where it may be first intersected by the lines above described, to the main Red river; thence down said river, in the middle of the main channel thereof to its intersection with the ninety-eighth meridian of longitude west from Greenwich; thence north, on said meridian line, to the place of beginning, * * *

By a separate treaty the Apache Tribe of Indians was incorporated with the Kiowa and Comanche Tribes of Indians and became entitled to share in the benefits of the above described Reservation, 15 Stat. 589. Article XII of the Treaty of October 21, 1867, *supra*, (known as the Medicine Lodge Treaty) provided as follows:

> No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians occupying

the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in Article III [VI] of this treaty.

Pursuant to section 14 of the Act of March 2, 1889, 25 Stat. 980, the President of the United States appointed a Commission comprised of David H. Jerome, as Chairman, Warren G. Sayre, and Alfred M. Wilson, to negotiate an agreement with the Indians for the cession of their land described in the 1867 Treaty. The Commissioners ultimately negotiated such an agreement on the 6th day of October 1892, which agreement became known as the Jerome Agreement. The Agreement contained a provision that it would become effective *only* when ratified by the Congress of the United States. On October 22, 1892, the United States Commissioners transmitted the Agreement to the President, who in turn reported the Agreement to the Congress. There was apparently a good deal of dissatisfaction among the members of the Indian tribes with respect to the terms of the Agreement and the manner of its procurement, which dissatisfaction was communicated to officials in Washington from time to time. Congress took no action with respect to the Jerome Agreement until it passed the Act of June 6, 1900, 31 Stat. 672, 676. That Act was entitled "An Act to ratify an Agreement with the Indians of the Fort Hall Indian Reservation in Idaho, and making appropriations to carry the same into effect." Section VI of that Act purported to quote verbatim and to ratify the Jerome Agreement made with the Kiowa, Comanche and Apache Indians in 1892. However, the so-called ratification contained in the Act of June 6, 1900,[1] made a number of changes

[1] The terms of the ratifying legislation were further changed by the Act of January 4, 1901, 31 Stat. 727, the Act of March 3, 1901, 31 Stat. 1078 and the Act of March 3, 1901, 31 Stat. 1093 in which Congress, among other things, extended the time for making allotments and the opening of the surplus land to settlement.

in the terms agreed to by the Indians and the Commissioners in the Jerome Agreement and such changes were never resubmitted to the Indians for acceptance or rejection as required by Article XII of the Treaty of October 21, 1867, quoted above. One of the changes made in 1900 concerned the classification of lands. The Jerome Agreement had provided that the land in the reservation should be classified as grain-growing land or as grazing land and that in making selection of the lands to be allotted in severalty, as provided elsewhere in the Agreement, each Indian should be required to take at least one-half of his or her allottment in land classified as grazing land. This provision was eliminated from the 1900 ratification and in its place Congress provided that the Secretary of the Interior should set aside for the use in common of the tribes 480,000 acres of grazing land to be selected by the Secretary of the Interior either in one or more tracts as should best subserve the interests of the Indians. As pointed out by the Indians, they were entitled under the Jerome Agreement to have their lands classified into grain-growing and grazing lands as an aid in making their selections. Whether, as contended by the Government, the change made in 1900 ultimately worked to the benefit of the Indians, or whether it did not, the fact remains that the ratification of the Jerome Agreement was not in the terms of the original Agreement agreed to by the Indians and the United States Commissioners.

The Jerome Agreement also provided that the Indians were to receive $2,000,000 for their surplus lands to be paid for as follows: $200,000 in cash to be distributed per capita within 120 days after ratification of the Agreement; $200,000 to be paid under direction of the Secretary of the Interior, one year after the first payment; $100,000 to be paid one year following the second payment; interest at the rate of 5 percent on the remaining $1,500,000 was to be paid to the Indians per capita annually. In the 1900 ratification of the Jerome Agreement Congress provided that

$500,000 was to be distributed per capita at such times and in such manner as the Secretary of the Interior should deem to be for the best interests of the Indians. The 1900 legislation then provided that interest on the remaining $1,500,000 was to be paid to the Indians per capita annually only in the event that the Indians were successful in defending a lawsuit which Congress had authorized the Choctaw and Chickasaw Nations to bring in the Court of Claims to determine the rights of such Nations to a reversionary interest in the unallotted lands.

The Act of 1900 eliminated the name of the Indian agent and that of an Army officer which the Indians and the United States had agreed under the Jerome Agreement should be beneficiaries of that Agreement.

The Jerome Agreement had provided that sections 16 and 36 in each township should be withheld from allottment. The Act of 1900 provided that sections 13 and 33 of each township on the reservation should be withheld from allotment in addition to sections 16 and 36. Thus the 1900 legislation doubled the amount of land withheld from allottment. Although under the 1900 legislation individual Indians would still receive the amount of land as individual allotments guaranteed to them by the Jerome Agreement, the withholding of the additional sections from allottment might well have prevented family units from making selections of contiguous lands.

The 1900 legislation also provided that if the allotted lands contained minerals they should be open to location and entry under the mining laws of the United States. Despite the fact that this provision was never enforced, its inclusion in the 1900 legislation represented a material change in the Jerome Agreement.

We are of the opinion that the Indian Claims Commission was correct in ruling that Congress did not actually ratify the Jerome Agreement, which was in essence a contract

between the Indians and the United States, because it was accepted in terms varying materially from the offer. The Government urges that the Indians are estopped from making such an argument because for years subsequent to the passage of the 1900 legislation the Indians *elected* to live within the terms of the 1900 law. As a matter of fact, the Indians did everything they could to escape the terms of the 1900 legislation. See *Lone Wolf* v. *Hitchcock*, 187 U. S. 553. As this court pointed out in *Sioux Tribe* v. *United States*, 125 C. Cls. 439, 443, the doctrine of acquiescence is hardly applicable to a dependent Indian tribe. *C. A. Moore, Survivor* v. *United States*, 32 C. Cls. 593, relied on by the United States, is distinguishable in that the Sioux Tribe in that case consented to the changes made by the Congress, and, along with the United States, regarded the unproclaimed treaty as being in effect. Furthermore, the *Moore* case was concerned with the rights of a white citizen of the United States to collect for an Indian depredation alleged to have been committed by the Sioux Tribe, and the court held that under the circumstances of that case the *United States* could not complain that the treaty was ineffective merely because it had not been proclaimed.

The Commission held that the Indians herein are entitled to recover the difference between the value of the land acquired by the United States on June 5, 1900, and the purchase price paid therefor on that date. We are of the opinion that the Commission was correct in so holding either on the ground that the Indians are entitled to the fair market value of the land as damages for breach of a contract implied in fact, or as a measure of their recovery on the grounds of fair and honorable dealings. It would be helpful to the court, and perhaps to the parties, if the Commission would phrase its holdings on liability in the terms of section 2 of the Indian Claims Commission Act.

On the question of the amount of recovery, the Commission found that the land acquired by the United States in

1900 was worth on an average $2 per acre, whereas the Indians were paid approximately 98.3 cents per acre. In their cross appeal the Indians urged that the evidence of record would support a valuation of $3.45 per acre, but the Indians concede that they are unable to show that the Commission's finding of $2 per acre is not supported by substantial evidence. The Government, on the other hand, urges that the Commission's findings are not supported by substantial evidence on the record as a whole and that the findings are not sufficiently basic and detailed to meet the tests laid down by this court in *Snake or Piute Indians* v. *United States*, 125 C. Cls. 241.

The record on valuation in the instant case is voluminous and represents careful and exhaustive preparation by the Indians and by the Government. Following the criteria suggested by this court in its decisions in *Roque River Tribe of Indians* v. *United States*, 116 C. Cls. 454, cert. den. 341 U. S. 902 and in *Alcea Band of Tillamooks, et al.* v. *United States*, 115 C. Cls. 463, reversed on the matter of interest only, *United States v. Alcea Band, etc.* 341 U. S. 48, the Indians Claims Commission appears to have carefully analyzed the record on valuation and made sufficiently detailed primary findings to adequately reflect that record and to fully support the ultimate finding of $2 an acre for the land in question. We are of the opinion that the findings on valuation are an adequate and accurate reflection of the evidence produced by the parties; that the burden of selecting from the conflicting evidence material upon which to base findings of fact has been admirably borne by the Commission and that its findings are supported by substantial evidence on the record as a whole and are therefore binding upon this court. The primary objection which the Government appears to have to the Commission's findings is that the Commission relied on some portions of the evidence rather than upon others. The choice which the Commission must make in a case such as this is not a simple one, but

we are of the opinion that the choice it has made in each instance was the proper one.

On the matter of offsets the Commission finally concluded that the Government had not succeeded in establishing any allowable offsets. The evidence submitted by the Government in support of its claim of offsets consisted of the usual voluminous report of the General Accounting Office. In accordance with the expressions of this court in *Quapaw Tribe, et al.* v. *United States*, 128 C. Cls. 45, the Indian Claims Commission has made a careful analysis of the reports of the General Accounting Office and has concluded, with respect to some of the offsets, that the United States had failed to sustain the burden of proof necessary to show that the expenditures actually were made for the benefit of the tribe. In other instances, the Commission has held that the amounts expended were for the benefit of individual Indians rather than for the benefit of the tribe and were therefore not allowable as offsets against a judgment for the tribe on a tribal claim. Although the Government argues that the Commission was supplied with a second report from the General Accounting Office purportedly devised to supply facts held by this court to be essential in the *Quapaw* case *supra*, the Report is not conclusive and the issue of whether or not such facts have been supplied as would support the allowance of an offset, is a matter for the judicial determination of the Indian Claims Commission. The Commission has made numerous detailed findings relative to the proof of offsets. Those findings adequately reflect the record on this matter and are supported by substantial evidence. In its opinion of March 12, 1957 (5 In. Cl. Comm. 96), the Commission has carefully considered each item of offset claimed and, in our opinion, has correctly ruled against the allowance of any of the offsets.

On the matter of interest, the Indians urge that the Commission erred in not allowing interest as a part of the

award. The Indians contend that although Congress had the power to take the surplus lands in question, Congress did not have the power to pay the Indians less than just compensation for the land which it took. The Indians concede that under the holding of the Supreme Court in *Lone Wolf* v. *Hitchcock*, *supra*, the acquisition by the United States of the land in question did not amount to a taking in the constitutional sense because of the plenary power of Congress over tribal relations of the Indians and over Indian tribal property. The Court held that the Act of June 6, 1900 was merely the exercise of such Congressional plenary power. While, as pointed out by the Indians, it is difficult to distinguish between an act of Congress which passes title to Indian land without the consent of the tribal owners and for no consideration, and an act of Congress which passes title to Indian land without the consent of the owners for only a portion of its true value at the time of acquisition, we think that the issue regarding the allowability of interest is not actually before the court in this appeal. The petition of the Indians before the Indian Claims Commission does not state a claim arising under the Constitution, but rather a claim which would result if the Jerome Agreement were revised on the grounds of fraud, duress, unconscionable consideration, mutual or unilateral mistake; and a claim based upon fair and honorable dealings. This court has held that awards rendered on claims arising under those portions of section 2 of the Indian Claims Commission Act do not bear interest. *The Osage Nation of Indians* v. *United States*, 119 C. Cls. 592, 671. The same is true of a claim under a contract which falls under that portion of section 2 of the Act providing for "all other claims in law or equity * * * with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; * * * ".

The final determination and award of the Indian Claims Commission in favor of the Indians, petitioners below, is affirmed.

It is so ordered.

LARAMORE, *Judge*; MADDEN, *Judge*; WHITAKER, *Judge*; and JONES, *Chief Judge*, concur.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

Appeal 3-57

(Decided October 8, 1958)

THE UNITED STATES

v.

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS

Mr. W. Braxton Miller, with whom was *Mr. Assistant Attorney General Perry W. Morton*, for appellant, *The United States*. *Mr. Ralph A. Barney* was on the briefs.

Mr. J. Roy Thompson, Jr. for cross appellant, *The Kiowa, Comanche and Apache Tribes of Indians*. *Messrs. W. C. Lewis* and *Frank Miskovsky* were on the brief.

ON MOTION OF THE UNITED STATES FOR REHEARING

PER CURIAM: The appellant, the United States, has moved for reconsideration in connection with three points relative to the court's opinion of July 16, 1958, in the matter of offsets.

As its first ground, the United States urges that the 1,104 depredations judgments paid out of the United States Treasury were proper offsets from the judgment rendered

by the Indian Claims Commission in favor of the Tribes, that the Commission erred in denying such payments as offsets, and that the court erred in affirming the decision of the Commission on this point.

The Indian Claims Commission Act makes the following provision with respect to the allowance of offsets:

> In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C. sec. 250), as amended; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural area, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

The depredations judgments in question were judgments rendered by this court pursuant to the Act of March 3, 1891,

26 Stat. 851, which conferred jurisdiction on this court to inquire into and determine finally all claims for property of United States citizens taken or destroyed by Indians without cause and not returned or paid for. Section 6 of the Act of March 3, 1891, made the following provisions for the payment of any judgment so rendered:

> That the amount of any judgment so rendered against any tribe of Indians shall be charged against the tribe by which, or by members of which the court shall find that the depredation was committed, and shall be deducted and paid in the following manner: First, from annuities due said tribe from the United States; second, if no annuities are due or available, then from any other funds due said tribe from the United States, arising from the sale of their lands or otherwise; third: if no such funds are due or available, then from any appropriation for the benefit of said tribe, other than appropriations for their current and necessary support, subsistence and education; and, fourth, if no such annuity, fund, or appropriation is due or available, then the amount of the judgment shall be paid from the Treasury of the United States: *Provided*, That any amount so paid from the Treasury of the United States shall remain a charge against such tribe, and shall be deducted from any annuity, fund or appropriation hereinbefore designated which may hereafter become due from the United States to such tribe.

All of the judgments in question were paid pursuant to the fourth alternative of section 6, i.e., from the Treasury of the United States, and it is the Government's contention that under the proviso of section 6 the amounts so paid are a charge against the Tribe and therefore are legal offsets to be deducted from the present judgment as a "fund" which has become "due from the United States to such Tribe."

In the Act of June 6, 1900, 31 Stat. 672, the land which was the subject of the instant claim before the Indian Claims Commission was ceded to the United States for the sum of $2,000,000, plus interest thereon. That Act provided that none of the money or interest thereon "which is, by the

terms of the said agreement, to be paid to said Indians shall be applied to the payment of any judgment that has or may hereinafter be rendered under the provisions of the Act of 1891, *supra*.

Under the provisions of 25 U. S. C. 126 (Act of July 15, 1871, 16 Stat. 335, 360, R. S. § 2098), no claim for Indian depredations could be paid until Congress should make a special appropriation therefor. Accordingly, each annual appropriation act (with one exception), commencing with the Act of July 28, 1892, 27 Stat. 282, 319, contained a provision for the payment of the depredation judgments in language substantially as follows:

> For payment of judgments of the Court of Claims in Indian depredation cases, * * * or so much thereof as may be necessary to pay and discharge such judgments as have been rendered against the United States after the deductions required to be made under the provisions of section six of the act approved March third, eighteen hundred and ninety-one, entitled "An act to provide for the adjustment and payment of claims arising from Indian depredations," shall have been ascertained and duly certified by the Secretary of the Interior to the Secretary of the Treasury, which certification shall be made as soon as practicable after the passage of this act, and such deductions shall be made according to the discretion of Secretary of the Interior, having due regard to the educational and other necessary requirements of the tribe or tribes affected and the amounts paid shall be reimbursed to the United States at such times, and in such proportions, as the Secretary of the Interior may decide to be for the interests of the Indian service.

The one exception mentioned above was the Act of August 26, 1912, 37 Stat. 595, 617-618, and in that Act Congress did not give the Secretary of the Interior discretion as to whether or not the United States would be reimbursed for this depredation judgment paid out of the Treasury of the United States.

In the years following the Act of March 3, 1891, the Secretary of the Interior exercised the first discretion placed in him by that act and certified that there were no funds of the Tribe available for payment of depredations "due regard being had to their educational and other necessary requirements." The Secretary also exercised the further discretion conferred upon him by the subsequent appropriation acts (except for the year 1912) and decided that it was not in the "interests of the Indian service" to reimburse the United States for the depredation judgments which had been paid out of the Treasury of the United States. In the fiscal year 1912 a depredation judgment in the sum of $719 was paid by the United States and in the appropriation act authorizing such payment the Secretary was not specifically given discretion to withhold reimbursement in "the interests of the Indian service."

The Indian Claims Commission decided that the depredation judgments paid out of the Treasury of the United States were not legal offsets because; although by the 1891 Act they were made a charge against the Tribe to be deducted from any sum becoming due from the United States to the Tribe, Congress had vested sole discretion in the Secretary of the Interior to determine whether or not such reimbursement should be made from tribal funds out of annual appropriations for such purposes. It was the opinion of the Commission that the depredation judgments were not legal offsets and that the Commission had no jurisdiction to review the actions of the Secretary taken in the exercise of his discretion. With respect to the $719 paid by the United States in 1912, the Commission ruled that this payment did not constitute a legal offset because, under the Act of June 6, 1900, supra, money paid to the Indians for the land ceded under that Act could not and should not be used for the payment of depredations judgments. The Commission suggested that this same ground would apply equally to all depredation judgments which had been paid by the United States.

We are of the opinion that the Commission was correct in holding that the reimbursement of the United States from tribal funds for payment of the Indian depredation judgments was a matter committed by Congress to the sole discretion of the Secretary of the Interior and that he had exercised his discretion as to all but one such judgment. We are further of the opinion that as to all but the 1912 depredation judgment appropriations, the issue of reimbursement is closed.

With respect to the payment of the $719 in 1912, the Secretary lacked discretion to withhold reimbursement in the "interests of the Indian Service" and unless the judgment in this case can be said to be money which by the terms of the 1900 agreement was to be paid to the Indians, that $719 would, under the proviso of section 6 of the 1891 Act, be a charge against the Tribe and therefore a proper offset. We think it is not such a proper offset.

The claim in this case is one arising under section 2 of the Indian Claims Commission Act, i.e., a claim resulting where the agreement of 1900 between the Indians and the United States is revised on the ground of unconscionable consideration. While it is clear that in the 1900 Act Congress may have been speaking about the $2,000,000, plus interest which the Indians would receive for their land when it spoke about the "money or interest thereon which is, by the terms of said agreement, to be paid to such Indians," we are of the opinion that the judgment in this case *is* money which is to be paid to the Indians pursuant to the 1900 agreement revised on the ground that the consideration provided for therein was unconscionable; otherwise there would be no basis for the claim. Accordingly, we hold that none of the depredation judgments paid by the United States and not reimbursed by the Secretary of the Interior, are legal offsets applicable to the judgment of the Commission in this case.

The United States further asks for a reconsideration on the matter of the allowability as an offset of cash payments to individual indigent Indians. The Commission held that payments to individual Indians were not proper offsets against a judgment in favor of the tribe and this court affirmed that holding. Defendant points to the fact that in our decision in *Quapaw Tribe* v. *United States*, 128 C. Cls. 45, the court held that the payment of board and funeral expenses of indigent Indians was a proper offset. In the same decision, however, this court held that presents to individual Indians did not constitute proper offsets against a judgment rendered on a tribal claim. Obviously, the two rulings were inconsistent and this inconsistency was discovered and briefed to the Commission in the course of the trial of the instant case. The Commission rightly determined to follow our ruling with respect to presents to individual Indians, and we affirmed that determination. To the extent that our holding is in conflict with our ruling in the *Quapaw* case respecting board and funeral expenses to individual Indians, that holding is overruled.

Finally, the United States contends that the Commission erred in refusing to apply the practice of prorating expenditures for the joint benefit of all the tribes under a single agency. Inasmuch as no offsetable items have been established by the United States in this case, there is no need for the court to pass on the issue of proration.

For the reasons set forth above, the motion of the United States for reconsideration is denied.

It is so ordered.

APPENDIX C

Sections 2 and 20 of the Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. 70a, 70s, creating the Indian Claims Commission, are in pertinent part as follows:

§ 70a. Jurisdiction; claims considered; offsets and counterclaims.

The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission.

All claims under this chapter may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States. * * *

§ 70s. Review by Court of Claims and Supreme Court.

(a) In considering any claim the Commission at any time may certify to the Court of Claims any definite and distinct questions of law concerning which instructions

are desired for the proper disposition of the claim; and thereupon the Court of Claims may give appropriate instructions on the questions certified and transmit the same to the Commission for its guidance in the further consideration of the claim.

(b) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 288 of Title 28.

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No. 665

In the Supreme Court of the United States

OCTOBER TERM, 1958

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS,
PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A CROSS-WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
PERRY W. MORTON,
Assistant Attorney General,
ROGER P. MARQUIS,
Attorney,
Department of Justice,
Washington 25, D.C.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

This is a cross-petition for writ of certiorari in a case in which the United States has filed a petition on other grounds, No. 664, this Term.

OPINIONS BELOW

The opinion of the Indian Claims Commission of March 12, 1957, is reported at 5 Ind. Cls. Com. 96. Its opinion of July 18, 1957, is reported at 5 Ind. Cls. Com. 297. The opinion of the Court of Claims of July 16, 1958 (Pet. App. 1a-11a) is reported at 163 F. Supp. 663. Its opinion of October 8, 1958 (Pet. App. 11a-17a) is reported at 166 F. Supp. 939.

JURISDICTION

The judgment of the Court of Claims was entered on July 16, 1958 (Pet. App. 11a). A timely petition of the United States for rehearing was denied on October 8, 1958 (Pet. App. 17a). The time for filing a cross-petition was, by order of January 3, 1959, extended to February 5, 1959. The cross-petition was filed on January 26, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255 and Section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. 70s.

QUESTION PRESENTED

Whether interest must be added to an award made under the Indian Claims Commission Act pursuant to a holding that the United States, as consideration for a cession of lands by an Indian Tribe in 1900, should have paid some $4,067,000 rather than the $2,000,000 it did pay.

STATUTE INVOLVED

Section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1050, 25 U.S.C. 70a, provides, in pertinent part, as follows:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant

would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. * * *

STATEMENT

Prior to 1889, the Kiowa, Comanche and Apache Tribes owned lands in Oklahoma. The so-called Jerome Agreement was negotiated with them, which Congress eventually ratified by the Act of June 6, 1900, 31 Stat. 672, 676, providing generally for the cession of the Oklahoma lands to the United States, for the allotment of them in severalty, and for the payment to the tribes of $2,000,000 for surplus lands. Lone Wolf and other members of the Tribes sought to enjoin execution of the Agreement on the grounds, among others, that changes made by Congress had not been approved and the Agreement and action taken thereunder violated constitutional rights of the Indians. Judgment for the defendants was affirmed by this Court, *Lone Wolf v. Hitchcock*, 187 U.S. 553, on the ground that Congress had plenary authority to administer property of the

Indians and the courts were not authorized to oversee the manner in which that power was exercised.

The same claim was asserted before the Indian Claims Commission under the Indian Claims Commission Act. The petition to the Commission alleged that the claim "is one which would result if the Jerome Agreement were revised on the grounds of fraud, duress, unconscionable consideration, mutual or unilateral mistake of fact, and is a claim based upon fair and honorable dealings as between a powerful guardian and a weak and helpless ward." The Commission sustained the claim on the ground that Indians had not agreed to the Agreement as enacted in the 1900 statute because of substantial changes made by Congress (App. 36-38).[1] The difference in consideration paid, as compared to the 1900 value of the lands ceded, was found to be $2,067,166 (App. 71). The Commission at first allowed some offsets against that award, but on rehearing denied them. In its opinion on rehearing, it also denied the Tribes' claim that interest since 1900 should be added to the award (App. 132-135). It reasoned that under *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49, interest cannot be allowed on unpaid claims against the United States unless statute or contract so provides, and that the only exception to that rule is when property is taken and the Fifth Amendment requires compensation for delay in payment. The *Lone Wolf* case, the Commission held, foreclosed the question whether the acquisition of the lands here was a taking under the Fifth Amendment. The Court of Claims affirmed the denial of interest on the ground that the

[1] References to "App." are to the Government's appendix as appellant in the Court of Claims, nine copies of which have been filed in No. 664.

petition of the Tribes did not state a claim arising under the Constitution (Pet. App. 10a).

ARGUMENT

1. Petitioners recognize that *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, must be overruled if they are to prevail. But they make no attack on the reasoning of that case nor do they give any justification for overturning a ruling which has stood as a guidepost in Indian law for some 55 years, and which this Court cited as authority this year in *Williams* v. *Lee*, No. 39, this Term, decided January 12, 1959, slip op., p. 7. There is a fundamental difference between the taking cases cited by petitioner (pp. 5-6) and cases where the Commission concludes that inadequate consideration has been paid. The difference is that liability in the latter instance arose, not from the Constitution, but solely because Congress, in the Indian Claims Commission Act, authorized re-examination of its prior transaction with the Indians. Since it did not provide for interest on any resulting award, none is payable. *United States* v. *Blackfeather*, 155 U.S. 180, claimed to be in conflict (Pet. 5), rested on the ground (155 U.S. at pp. 192-193) that "there was a contract expressly stipulating for the payment of interest."

2. As both the Commission and the Court of Claims have held, petitioners' claim on the merits was not asserted under the Constitution. The court rested liability on the basis of recovery of damages for breach of a contract implied in fact, or recovery on grounds of fair and honorable dealings (Pet. App. 7a); or on the ground that the contract has to be revised because of unconscionable consideration (Pet. App. 16a). Interest may not be added to awards made on any of those

bases. See *United States v. Alcea Band of Tillamooks*, 341 U.S. 48, 49.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.[2]

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

ROGER P. MARQUIS,
Attorney.

FEBRUARY, 1959

[2] There is, of course, no connection between the questions presented in the Government's petition in No. 664 and the question presented in this cross-petition.

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